[redacted]

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation

https://archive.org/details/californiareport0000unse_n3q4

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES

WEST KEY NUMBER SYSTEM

95 P.2d – 96 P.2d

TO BE CITED BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.
1941

COPYRIGHT, 1939, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 95, Nos. 1-4;
Vol. 96, Nos. 1, 2.

COPYRIGHT, 1940, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 96, Nos. 3, 4.

COPYRIGHT, 1941, BY WEST PUBLISHING CO.

CAL.REP.95–96 P.2d
5th Reprint—1974

CASES REPORTED

	Vol.		Page
Adjustment Corporation v. Hollywood Hardware & Paint Co., App.	96	P.2d	161
A. F. Mattock Co.; Dingman v., App.	96	P.2d	821
Ambassador Hotel Co. of Los Angeles; Koppelman v., App.	96	P.2d	196
American Distilling Co.; Kerr Gifford & Co. v., App.	95	P.2d	694
Atkinson v. Atkinson, App.	96	P.2d	824
Aurenz v. Los Angeles Ry. Corporation, App.	96	P.2d	397
Bacon; Stulz v., App.	96	P.2d	369
Bank of America Nat. Trust & Savings Ass'n; Gonsalves v., App.	96	P.2d	391
Barbers' Union, Local 134; Evju v., App.	96	P.2d	1020
Barcroft v. Livacich, App.	96	P.2d	951
Bard v. Kent, App.	95	P.2d	957
Beard; People v., App.	96	P.2d	961
Beckett v. City of Paris Dry Goods Co., two cases, Sup.	96	P.2d	122
Beckhard; People v., Sup.	96	P.2d	794
Benson v. Gardner, Sup.	95	P.2d	136
Biscailuz; Lantin v., App.	95	P.2d	962
Blache v. Superior Court in and for City and County of San Francisco, App.	96	P.2d	970
Blackwood; People v., App.	96	P.2d	982
Board of Trustees of Compton Junior College Dist. in Los Angeles County; Comstock v., App.	95	P.2d	969
Boles; People v., App.	95	P.2d	949
Boone; Parmely v., App.	96	P.2d	164
Borneman's Estate, In re, App.	96	P.2d	182
Breitengross v. Theodore Krumm, Inc., App.	96	P.2d	370
Browne v. Superior Court in and for City and County of San Francisco, App.	95	P.2d	178
Burford v. Huesby, App.	96	P.2d	380
Burnette, Ex parte, App.	95	P.2d	684
California Employment Commission; Gantner & Mattern Co. v., App.	96	P.2d	802
California State Board of Education; Jordt v., App.	96	P.2d	809
California Talc Co.; Henrickson v., App.	96	P.2d	175
Cane v. State Bar of California, two cases, Sup.	95	P.2d	934
Carey; Foster v., App.	96	P.2d	155
Carkeek; People v., App.	96	P.2d	132
Carlander; Secreto v., App.	95	P.2d	476
Carpenter v. Pacific Mut. Life Ins. Co. of California, Sup.	96	P.2d	796
Carpenter v. Pacific Mut. Life Ins. Co. of California, Sup.	96	P.2d	800
Cazaurang's Estate, In re, App.	96	P.2d	185
Chapman, People on Complaint of, v. Rapsey, App.	96	P.2d	1000
Charles Lomori & Son v. Globe Laboratories, App.	95	P.2d	173
Christin; Story v., Sup.	95	P.2d	925
City and County of San Francisco; West Coast Advertising Co. v., Sup.	95	P.2d	138
City of Bayshore; Thomas v., App.	96	P.2d	389
City of Paris Dry Goods Co.; Beckett v., Sup.	96	P.2d	122
City of San Fernando; Johnston v., App.	95	P.2d	147
Coan v. Superior Court in and for San Bernardino County, Sup.	95	P.2d	931
Coloneus; Stobbs v., App.	95	P.2d	183
Comstock v. Board of Trustees of Compton Junior College Dist. in Los Angeles County, App.	95	P.2d	969

	Vol.		Page
Cone's Estate, In re, App.	95	P.2d	183
Conkey; Van Dyke v., App.	96	P.2d	383
Conkey's Estate, In re, App.	96	P.2d	383
Connecticut General Life Ins. Co.; Mundt v., App.	95	P.2d	966
Cooper; People v., App.	96	P.2d	1012
Davis v. State Board of Optometry, App.	95	P.2d	959
De Brincat; Whitfield v., App.	96	P.2d	156
Dingman v. A. F. Mattock Co., App.	96	P.2d	821
Dorr v. Rehkopf, App.	95	P.2d	461
Ellingson v. Walsh, O'Connor & Barneson, App.	95	P.2d	185
Estrin v. Superior Court in and for Sacramento County, Sup.	96	P.2d	340
Evans v. Superior Court in and for City and County of San Francisco, Sup.	96	P.2d	107
Evju v. Barbers' Union, Local 134, App.	96	P.2d	1020
Flumerfelt; People v., App.	96	P.2d	190
Forbes v. Mattos, App.	96	P.2d	166
Foster v. Carey, App.	96	P.2d	155
Franks; Stern v., App.	96	P.2d	802
Galston & Sutton Theatres; Windas v., App.	96	P.2d	170
Gantner & Mattern Co. v. California Employment Commission, App.	96	P.2d	802
Gardner; Benson v., Sup.	95	P.2d	136
Gibson v. Mendocino County, App.	96	P.2d	1005
Gifford & Co. v. American Distilling Co., App.	95	P.2d	694
Globe Laboratories; Charles Lomori & Son v., App.	95	P.2d	173
Gonsalves v. Bank of America Nat. Trust & Savings Ass'n, App.	96	P.2d	391
Gordon; Janssen v., App.	96	P.2d	152
Greig; People v., Sup.	95	P.2d	936
Griffin; People v., App.	96	P.2d	989
Grimes; People v., App.	95	P.2d	486
Hanks; People v., App.	95	P.2d	478
Harris; People v., App.	95	P.2d	944
Harrison; Stub v., App.	96	P.2d	979
Henrickson v. California Talc Co., App.	96	P.2d	175
Hess v. Moodey, App.	95	P.2d	699
Higgins v. Pacific Electric R. Co., App.	96	P.2d	1022
Hill; Jenkins v., App.	96	P.2d	168
Hoffman v. Superior Court in and for San Diego County, App.	96	P.2d	185
Hohnemann v. Pacific Gas & Electric Co., App.	96	P.2d	350
Hollywood Hardware & Paint Co.; Adjustment Corporation v., App.	96	P.2d	161
Honeyman v. Lawrie, App.	95	P.2d	166
Hopkins v. MacCulloch, App.	95	P.2d	950
House v. Pacific Greyhound Lines, App.	95	P.2d	465
Howes v. Reeves, App.	96	P.2d	831
Huesby; Burford v., App.	96	P.2d	380
Hurst; People v., App.	96	P.2d	1003
Industrial Accident Commission; Massachusetts Bonding & Insurance Co. v., App.	96	P.2d	1009
Industrial Accident Commission; Walker Mining Co. v., App.	95	P.2d	188
Inouye v. McCall, App.	96	P.2d	386
Izuel; Rotea v., Sup.	95	P.2d	927
Jackson v. Master Holding Corporation, App.	95	P.2d	498
Janssen v. Gordon, App.	96	P.2d	152
Jenkins v. Hill, App.	96	P.2d	168
Johnston v. City of San Fernando, App.	95	P.2d	147
Jones v. Lewis, App.	95	P.2d	698
Jordan v. Retirement Board, San Francisco City and County Employees Retirement System, App.	96	P.2d	973
Jordt v. California State Board of Education, App.	96	P.2d	809
Joseph v. Vogt, App.	95	P.2d	947

CASES REPORTED

	Vol.		Page
Judson v. Somers, App.	96	P.2d	395
Judson's Estate, In re, App.	96	P.2d	395
Kelly v. Liddicoat, App.	96	P.2d	186
Kelly; People v., App.	96	P.2d	372
Kent; Bard v., App.	95	P.2d	957
Kerr Gifford & Co. v. American Distilling Co., App.	95	P.2d	694
Knapp; Watterson v., App.	95	P.2d	154
Knight; People v., App.	96	P.2d	173
Koppelman v. Ambassador Hotel Co. of Los Angeles, App.	96	P.2d	196
Kramer v. Superior Court in and for Calaveras County, App.	95	P.2d	158
Lantin v. Biscailuz, App.	95	P.2d	962
Lawrie; Honeyman v., App.	95	P.2d	166
Leonis; Shea v., Sup.	96	P.2d	332
Lewis; Jones v., App.	95	P.2d	698
Liddicoat; Kelly v., App.	96	P.2d	186
Livacich; Barcroft v., App.	96	P.2d	951
Lomori & Son v. Globe Laboratories, App.	95	P.2d	173
Long; People v., App.	96	P.2d	354
Long; People v., App.	96	P.2d	1021
Los Angeles Examiner; Metter v., App.	95	P.2d	491
Los Angeles Ry. Corporation; Aurenz v., App.	96	P.2d	397
Lovlee; People v., App.	96	P.2d	177
Lyons v. Lyons, App.	96	P.2d	1018
Lyons' Estate, In re, App.	96	P.2d	1018
McAllister, In re, Sup.	95	P.2d	932
McAtee; People v., App.	95	P.2d	471
McCall; Inouye v., App.	96	P.2d	386
McClurken; Staley v., App.	96	P.2d	805
MacCulloch; Hopkins v., App.	95	P.2d	950
McKay v. Security-First Nat. Bank of Los Angeles, App.	96	P.2d	376
Mandell; People v., App.	95	P.2d	704
Massachusetts Bonding & Insurance Co. v. Industrial Accident Commission, App.	96	P.2d	1009
Master Holding Corporation; Jackson v., App.	95	P.2d	498
Mattos; Forbes v., App.	96	P.2d	166
Mendocino County; Gibson v., App.	96	P.2d	1005
Metter v. Los Angeles Examiner, App.	95	P.2d	491
Milligan; Southern Pac. Milling Co. v., App.	96	P.2d	1010
Milton; People v., App.	96	P.2d	159
Mogle v. Moore, App.	96	P.2d	147
Moodey; Hess v., App.	95	P.2d	699
Moore; Mogle v., App.	96	P.2d	147
Moran v. Superior Court in and for Sacramento County, App.	96	P.2d	193
Mundt v. Connecticut General Life Ins. Co., App.	95	P.2d	966
Munzie; People v., App.	95	P.2d	685
Nebelung v. Norman, Sup.	96	P.2d	327
Norman; Nebelung v., Sup.	96	P.2d	327
Pacific Electric R. Co.; Higgins v., App.	96	P.2d	1022
Pacific Electric R. Co.; Tice v., App.	96	P.2d	1022
Pacific Gas & Electric Co.; Hohnemann v., App.	96	P.2d	350
Pacific Greyhound Lines; House v., App.	95	P.2d	465
Pacific Mut. Life Ins. Co. of California; Carpenter v., Sup.	96	P.2d	796
Pacific Mut. Life Ins. Co. of California; Carpenter v., Sup.	96	P.2d	800
Parmely v. Boone, App.	96	P.2d	164
Paterson; Slemons v., Sup.	96	P.2d	125
Payton; People v., App.	96	P.2d	991
People v. Beard, App.	96	P.2d	961
People v. Beckhard, Sup.	96	P.2d	794
People v. Blackwood, App.	96	P.2d	982

CASES REPORTED

	Vol.		Page
People v. Boles, App.	95	P.2d	949
People v. Carkeek, App.	96	P.2d	132
People v. Cooper, App.	96	P.2d	1012
People v. Flumerfelt, App.	96	P.2d	190
People v. Greig, Sup.	95	P.2d	936
People v. Griffin, App.	96	P.2d	989
People v. Grimes, App.	95	P.2d	486
People v. Hanks, App.	95	P.2d	478
People v. Harris, App.	95	P.2d	944
People v. Hurst, App.	96	P.2d	1003
People v. Kelly, App.	96	P.2d	372
People v. Knight, App.	96	P.2d	173
People v. Long, App.	96	P.2d	354
People v. Long, App.	96	P.2d	1021
People v. Lovlee, App.	96	P.2d	177
People v. McAtee, App.	95	P.2d	471
People v. Mandell, App.	95	P.2d	704
People v. Milton, App.	96	P.2d	159
People v. Munzie, App.	95	P.2d	685
People v. Payton, App.	96	P.2d	991
People v. Pierce, Sup.	96	P.2d	784
People v. Pociask, Sup.	96	P.2d	788
People v. Sanchez, App.	95	P.2d	169
People v. Sanchez, App.	95	P.2d	462
People v. Scobey, App.	95	P.2d	145
People v. Sikora, Sup.	96	P.2d	788
People v. Smith, Sup.	95	P.2d	453
People v. Snyder, App.	96	P.2d	986
People v. Stralla, Sup.	96	P.2d	941
People v. Tibbitts, two cases, App.	96	P.2d	812
People v. Tindall, App.	96	P.2d	136
People v. Vargas, App.	96	P.2d	172
People v. Waller, Sup.	96	P.2d	344
People v. Watson, App.	96	P.2d	374
People v. Whitlow, App.	96	P.2d	977
People v. Williams, Sup.	95	P.2d	456
People v. Yoder, App.	95	P.2d	470
People v. Zoffel, App.	95	P.2d	160
People, on Complaint of Chapman, v. Rapsey, App.	96	P.2d	1000
Percy; Valdez v., App.	96	P.2d	142
Peterson v. Wolfer Printing Co., App.	95	P.2d	686
Pierce; People v., Sup.	96	P.2d	784
Pociask; People v., Sup.	96	P.2d	788
Price v. Schroeder, App.	96	P.2d	949
Prussing v. Prussing, App.	96	P.2d	128
Quinn v. Rosenfeld, App.	95	P.2d	191
Rapsey; People, on Complaint of Chapman, v., App.	96	P.2d	1000
Reeves; Howes v. App.	96	P.2d	831
Reeves v. Vallow, App.	95	P.2d	945
Rehkopf; Dorr v., App.	95	P.2d	461
Rehkopf; Werk v., App.	95	P.2d	464
Retirement Board, San Francisco City and County Employees Retirement System; Jordan v., App.	96	P.2d	973
Riverside County; Southern Pac. Co. v., App.	95	P.2d	688
Rosenfeld; Quinn v., App.	95	P.2d	191
Rotea v. Izuel, Sup.	95	P.2d	927
St. Laurent v. St. Laurent, App.	95	P.2d	475
Sanchez; People v., App.	95	P.2d	169
Sanchez; People v., App.	95	P.2d	462

	Vol.		Page
San Diego County; San Diego Trust & Savings Bank v., App.	96	P.2d	137
San Diego Trust & Savings Bank v. San Diego County, App.	96	P.2d	137
Schroeder; Price v., App.	96	P.2d	949
Schwartz; Smith v., App.	96	P.2d	816
Scobey; People v., App.	95	P.2d	145
Secreto v. Carlander, App.	95	P.2d	476
Security-First Nat. Bank of Los Angeles; McKay v., App.	96	P.2d	376
Security-First Nat. Bank of Los Angeles; Wright v., App.	95	P.2d	194
Shea v. Leonis, Sup.	96	P.2d	332
Showalter v. Western Pac. R. Co., App.	96	P.2d	964
Sikora; People v., Sup.	96	P.2d	788
Silvers; Wood v., App.	96	P.2d	366
Skidmore v. Tuolumne County, App.	96	P.2d	178
Slemons v. Paterson, Sup.	96	P.2d	125
Smith; People v., Sup.	95	P.2d	453
Smith v. Schwartz, App.	96	P.2d	816
Snyder; People v., App.	96	P.2d	986
Somers; Judson v., App.	96	P.2d	395
Southern Pac. Co. v. Riverside County, App.	95	P.2d	688
Southern Pac. Milling Co. v. Milligan, App.	96	P.2d	1010
Staley v. McClurken, App.	96	P.2d	805
State Bar of California; Cane v., Sup.	95	P.2d	934
State Board of Optometry; Davis v., App.	95	P.2d	959
Stern v. Franks, App.	96	P.2d	802
Stralla; People v., Sup.	96	P.2d	941
Stobbs v. Coloneus, App.	95	P.2d	183
Story v. Christin, Sup.	95	P.2d	925
Stub v. Harrison, App.	96	P.2d	979
Stulz v. Bacon, App.	96	P.2d	369
Superior Court in and for Calaveras County; Kramer v., App.	95	P.2d	158
Superior Court in and for City and County of San Francisco; Blache v., App.	96	P.2d	970
Superior Court in and for City and County of San Francisco; Browne v., App.	95	P.2d	178
Superior Court in and for City and County of San Francisco; Evans v., Sup.	96	P.2d	107
Superior Court in and for City and County of San Francisco; Thew Shovel Co. v., App.	95	P.2d	149
Superior Court in and for Los Angeles County; Williams v., Sup.	96	P.2d	334
Superior Court in and for Sacramento County; Estrin v., Sup.	96	P.2d	340
Superior Court in and for Sacramento County; Moran v., App.	96	P.2d	193
Superior Court in and for San Bernardino County; Coan v., Sup.	95	P.2d	931
Superior Court in and for San Diego County; Hoffman v., App.	96	P.2d	185
Theodore Krumm, Inc.; Breitengross v., App.	96	P.2d	370
Thew v. Thew, App.	96	P.2d	826
Thew Shovel Co. v. Superior Court in and for City and County of San Francisco, App.	95	P.2d	149
Thomas v. City of Bayshore, App.	96	P.2d	389
Tibbitts; People v., App.	96	P.2d	812
Tice v. Pacific Electric R. Co., App.	96	P.2d	1022
Tindall; People v., App.	96	P.2d	136
Towns v. Towns, App.	96	P.2d	971
Tuolumne County; Skidmore v., App.	96	P.2d	178
Turner v. Turner, App.	96	P.2d	363
Turner's Estate, In re, App.	96	P.2d	363
Useldinger, In re, App.	96	P.2d	958
Valdez v. Percy, App.	96	P.2d	142
Vallow; Reeves v., App.	95	P.2d	945
Van Dyke v. Conkey, App.	96	P.2d	383

CASES REPORTED

	Vol.		Page
Vargas; People v., App.	96	P.2d	172
Vogt; Joseph v., App.	95	P.2d	947
Walker Mining Co. v. Industrial Accident Commission, App.	95	P.2d	188
Waller; People v., Sup.	96	P.2d	344
Walsh, O'Connor & Barneson; Ellingson v., App.	95	P.2d	185
Watson; People v., App.	96	P.2d	374
Watterson v. Knapp, App.	95	P.2d	154
Werk v. Rehkopf, App.	95	P.2d	464
West Coast Advertising Co. v. City and County of San Francisco, Sup.	95	P.2d	138
Western Pac. R. Co.; Showalter v., App.	96	P.2d	964
Whitfield v. De Brincat, App.	96	P.2d	156
Whitlow; People v., App.	96	P.2d	977
Williams; People v., Sup.	95	P.2d	456
Williams v. Superior Court in and for Los Angeles County, Sup.	96	P.2d	334
Windas v. Galston & Sutton Theatres, two cases, App.	96	P.2d	170
Wolfer Printing Co.; Peterson v., App.	95	P.2d	686
Wood v. Silvers, App.	96	P.2d	366
Woodson's Estate, In re, App.	96	P.2d	1016
Wright v. Security-First Nat. Bank of Los Angeles, App.	95	P.2d	194
Yoder; People v., App.	95	P.2d	470
Zoffel; People v., App.	95	P.2d	160

CALIFORNIA REPORTER

IN VOLUME

95 PACIFIC REPORTER

SECOND SERIES

14 Cal.2d 526

BENSON v. GARDNER et al.

L. A. 17268.

Supreme Court of California.

Oct. 26, 1939.

1. Appeal and error ⚿544(3)

An appeal from judgment for defendants pursuant to an order sustaining demurrer to complaint without leave to amend may be taken, presented and determined on the judgment roll alone.

2. Appeal and error ⚿607(1)

The time for filing notice requesting preparation of appeal transcript does not begin to run until written notice of entry of judgment is given or waived pursuant to statute. Code Civ.Proc. §§ 953a, 953d.

3. Appeal and error ⚿607(1)

The filing of notice of appeal does not constitute waiver of written notice of entry of judgment so as to cause the statutory time for filing notice requesting preparation of transcript to begin to run. Code Civ. Proc. §§ 953a, 953d.

4. Appeal and error ⚿607(1)

Under amendment extending scope of the statute authorizing notice of request for transcript in lieu of bill of exceptions, one appealing on the judgment roll alone may avail himself of such statute and hence is not in default by failing to do anything in furtherance of appeal after filing notice of appeal, where respondents have not given notice of entry of judgment. Code Civ.Proc. §§ 953a, 953d.

5. Appeal and error ⚿607(1)

The purpose of amendment extending scope of the statute authorizing notice of request for transcript in lieu of bill of exceptions was to overcome effects of decision that appeals taken on judgment rolls alone were excluded from such statute, and to bring such appeals within scope of such statute. Code Civ.Proc. §§ 953a, 953d.

In Bank.

Appeal from Superior Court, Los Angeles County.

Action by Mark Benson against Charles Gardner and others. From a judgment for defendants entered pursuant to an order sustaining a demurrer, plaintiff appeals. On defendants' motion to dismiss the appeal.

Motion denied.

Herbert Cutler Brown, of Los Angeles, for appellant.

C. Ibeson Sweet, of Los Angeles, for respondents.

KNIGHT, Justice pro tem.

Respondents move to dismiss the appeal herein upon the grounds that no transcript has been filed and that the forty-day period fixed by section 1 of rule I of the Rules for the Supreme Court and District Courts of Appeal within which a transcript could have been filed has long since expired.

[1] The appeal was taken from a judgment entered in favor of respondents pursuant to an order sustaining a demurrer to the complaint without leave to amend; hence it is one that may be taken, presented and determined on the judgment roll alone. City of Los Angeles v. Forrester, 4 Cal. 2d 152, 48 P.2d 27. Notice of appeal was served and filed on August 26, 1938, which was within sixty days after the entry of judgment, but since then appellant has done nothing in furtherance of appeal. On the other hand, respondents have never given notice of entry of the judgment, nor has appellant in any manner waived such notice.

[2, 3] The determinative question presented by the motion is whether in taking an appeal such as this, that is, on the judgment roll alone, an appellant may avail himself of the alternative method prescribed by section 953a of the Code of Civil Procedure; for if it be the law that such method may be invoked, then the appellant herein is not in default, for the reason that until written notice of entry of the judgment is given or waived, the time within which he must initiate proceedings for the preparation of a transcript does not start to run. In other words, section 953a provides that the notice requesting the preparation of the transcript must be filed "* * * within ten (10) days after notice of entry of the judgment * * *", and it is well settled that the period of time thereby fixed does not begin to run until written notice of the entry of judgment is given or waived in the manner specified by section 953d of the same code, and that the filing of notice of appeal does not constitute a waiver of such notice. Griffin v. Kent, 206 Cal. 263, 274 P. 56; Attkisson v. Reynolds, 94 Cal.App. 185, 270 P. 686;

Smith v. Wall, 97 Cal.App. 674, 275 P. 983; Best v. Smith, 22 Cal.App.2d 363, 71 P.2d 78; Sterling Corporation v. Superior Court, 207 Cal. 370, 278 P. 859.

[4] It is evident from a review of the history of section 953a and of the cases construing its provisions that the question at issue should be answered in the affirmative. It appears therefrom that in 1915, St. 1915, p. 206, the legislature materially extended the scope of said section by way of amendment thereto; and that while the construction placed on the section before it was amended was that appeals taken upon the judgment roll alone excluded from the operation thereof (Harpold v. Slocum, 168 Cal. 364, 143 P. 609; Lapique v. Plummer, 33 Cal.App. 317, 165 P. 56), since the adoption of the amendment a contrary rule of construction has prevailed. McKinnell v. Hansen, 34 Cal.App. 76, 81, 167 P. 887; Beckett v. Stuart, 35 Cal.App. 796, 171 P. 107; Ramsay v. Rodgers, 189 Cal. 100, 207 P. 516; Lake v. Harris, 198 Cal. 85, 243 P. 417; Charles v. City of Crescent City, 12 Cal.2d 241, 83 P.2d 34. That is to say, prior to the amendment of 1915 section 953a provided that any person desiring to appeal from any judgment, order or decree of the superior court "may, in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section 650 of this code", St. 1907, p. 750, file with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting a transcript, etc.; and the construction placed on said section as it then stood was that the method of appeal therein provided could be invoked only in cases where a reporter's transcript was required. In thus circumscribing the scope of the section the court in Lapique v. Plummer, supra, said: "* * * the appeal is upon the judgment roll alone, a transcript of which is presented by a certified typewritten copy. No authority is found, either in the rules of the court or in the statutory provisions of the Code, for this method of bringing up the record, where it consists solely and alone of the judgment roll. In the cases there specified sections 953a, 953b, and 953c, Code of Civil Procedure, provide for the preparation, certification, and filing of phonographic reports and transcripts of records to be used on appeal; but these sections do not apply to the transcript where the appeal is from the judgment upon the judgment roll alone." Citing Harpold v. Slocum, supra. But in 1915, the legislature broadened the operation of section 953a by adding immediately after the words "of this code" two clauses reading as follows: "or for the purpose of presenting a record on appeal from any appealable judgment or order, or for the purpose of having reviewed any matter or order reviewable on appeal from final judgment"; and shortly after the adoption of the amendment it was held by this court in an opinion denying a petition for hearing after decision of the District Court of Appeal, in the case of McKinnell v. Hansen, supra, that the alternative method of appeal as then set up by section 953a was available where the appeal was taken upon the judgment roll alone. In so holding the court went on to say [34 Cal.App. 76, 167 P. 888]: "Prior to the amendment of section 953a in 1915 it was held that when the appeal was on the judgment roll alone no record on appeal could be prepared thereunder, but it is settled by decisions made since the amendment that the effect thereof is to authorize a record thereunder even when the appeal is on the judgment roll alone, with the consequent right to a typewritten record thereof." And ever since the rendition of that opinion the courts have consistently adhered to such construction. The case of Beckett v. Stuart, supra, decided soon afterwards, held to the same effect; and both of those cases have been cited approvingly and the rule thereof has been restated and applied in numerous later cases, among them being Ramsay v. Rodgers, supra; Lake v. Harris, supra, and Charles v. City of Crescent City, supra. In Lake v. Harris, supra, the language used in reaffirmance of the rule was as follows [198 Cal. 85, 243 P. 419]: "The effect of the amendment [of 1915 to section 953a] was to authorize the preparation of a record under that section, even where the appeal is on the judgment roll alone. See opinion of Supreme Court appended to McKinnell v. Hansen, 34 Cal. App. [76], 81, 167 P. 887, in denying petition for rehearing; also Beckett v. Stuart, 35 Cal.App. 796, 171 P. 107; Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715." Moreover, as shown by the case of Charles v. City of Crescent City, supra, no exception is made of that class of appeals taken on the judgment roll alone

wherein there has been no trial on the merits, for in that case, as here, the appeal was taken from a judgment entered in favor of the defendants pursuant to an order sustaining demurrers to a complaint without leave to amend; and it was held that the provisions of section 953a were available in taking such appeal and that the typewritten transcript procured in accordance therewith was sufficient for its presentation.

[5] Apart from any arguments advanced in those cases, there have been no reasons suggested in support of the present motion which would justify the belief that when in 1915 the legislature broadened the operation of section 953a, it intended that the restricted construction theretofore placed thereon should continue; and the fact that said section was revised shortly after the rendition of the decision in Harpold v. Slocum, supra, which excluded appeals taken on judgment rolls alone from the operation of said code section, tends strongly to prove that the real purpose of the amendment was to overcome the effects of that decision and to bring all appeals taken on the judgment roll alone within the scope of said code section.

It has been stated that the construction thus given the section places the party taking an appeal such as this in a position to delay indefinitely the presentation and determination thereof. But such is not the case, for the simple reason that as in all other appeals taken pursuant to section 953a the procedure prescribed therein for initiating the proceedings for the preparation of a transcript may be set in motion at any time by the respondent himself, merely by serving upon the appellant notice of the entry of judgment. Nor may it be said that such construction conflicts with any of the views expressed in the case of Miller v. Price, 203 Cal. 772, 265 P. 931. The portion of the decision therein which is pertinent here holds merely that a typewritten transcript on appeal taken on the judgment roll alone, when properly certified, is sufficient under the provisions of section 950 of said code for the presentation of the appeal, even though no attempt has been made to secure a record pursuant to the provisions outlined in section 953a (Charles v. City of Crescent City, supra), and that under section 950 written notice to the clerk to prepare the transcript is not essential to its legal sufficiency.

Therefore, since the provisions of section 953a are available in taking an appeal of this kind, it cannot be held that the appellant herein is in default, because, under the authorities hereinabove cited, the period of time fixed by said section within which he may initiate proceedings to procure a transcript does not begin to run until respondents serve their notice of entry of the judgment, or such notice is waived in the manner provided by section 953d. Accordingly the motion to dismiss should be denied, and it is so ordered.

We concur: SHENK, J.; CURTIS, J.; HOUSER, J.; SPENCE, J. pro tem.

---

14 Cal.2d 516

WEST COAST ADVERTISING CO. v. CITY AND COUNTY OF SAN FRANCISCO.

S. F. 15949.

Supreme Court of California.

Oct. 26, 1939.

1. Municipal corporations 🔑57, 59

Generally, municipal corporations have only the powers expressly conferred and such as are necessarily incident to those expressly granted or essential to the declared objects and purposes of the corporation.

2. Municipal corporations 🔑58, 78

Where a city has availed itself of provisions of constitution as amended in 1914 respecting powers of cities to make and enforce regulations concerning municipal affairs, such city has full control over its municipal affairs unaffected by general laws on same subject matters, and the city has such control whether or not its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within limitations or restrictions placed in charter. Const. art. 11, §§ 6, 8, as amended in 1914.

3. Licenses 🔑6(1)

Where city and county of San Francisco had adopted a charter embodying provisions of constitution as amended in 1914 respecting power of cities to make and enforce regulations concerning municipal affairs, in determining whether municipality had power to impose and collect license taxes for revenue purposes question was not whether charter granted power to impose such taxes, but whether charter prohibited the taxes. St.1899, p. 249, art. 2, c. 2, § 1, subd. 15; St.1931, pp. 2978, 2991, §§ 2, 24; Const. art. 11, §§ 6, 8, as amended in 1914.

4. Municipal corporations 🔑58

A charter adopted by a city which has availed itself of provisions of constitution as amended in 1914 respecting power of cities to make and enforce regulations concerning municipal affairs is not a grant of powers, but is an instrument which accepts the privilege, granted by constitution, of complete autonomous rule with respect to municipal affairs and any power not expressly forbidden by charter or constitution may be exercised by city, and limitations upon exercise of such power are only those specified in charter. Const. art. 11, §§ 6, 8, as amended in 1914.

5. Municipal corporations 🔑59

The enumeration of certain powers in a city's charter does not exclude the exercise of powers not enumerated, except as limited by the charter and constitution. Const. art. 11, §§ 6, 8, as amended in 1914.

6. Licenses 🔑6(1)

The levy of taxes by a municipality for revenue purposes, including license taxes, is a "municipal affair" within contemplation of constitutional provision authorizing cities, by amending their existing charters, to make and enforce regulations concerning municipal affairs. Const. art. 11, §§ 6, 8, as amended in 1914.

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

7. Municipal corporations 🔑73, 956(1)

A municipality's local power of taxation, like other local powers, must have its origin in a grant by the state, and such power may at all times be controlled by the sovereign power.

8. Municipal corporations 🔑956(1)

The power of cities operating under freeholders' charters to raise money by taxation for municipal purposes does not find its source in any grant by the Legislature, but such power has been directly granted by the people of the state through provisions of constitution respecting powers of cities to make regulations concerning municipal affairs. Const. art. 11, §§ 6, 8, as amended in 1914.

9. Licenses 🔑6(2)

Where section of charter of city and county of San Francisco provided that board of supervisors should regulate, by ordinance, the issuance and revocation of licenses for operation of businesses affecting designated matters "and for such other matters as the board of supervisors may deem advisable," quoted clause did not restrict power of municipality to impose license taxes for revenue purposes only upon businesses affecting matters designated in charter, especially when remaining language of section did not manifest an intent that such clause have a limiting effect. St.1899, p. 249, art. 2, c. 2, § 1, subd. 15; St.1931, pp. 2978, 2991, §§ 2, 24; Const. art. 11, §§ 6, 8, as amended in 1914; Pol. Code, §§ 3366, 4041.14.

10. Licenses 🔑6(1)

Where city and county of San Francisco had adopted a charter embodying provision of constitution as amended in 1914 respecting powers of cities to make and enforce regulations concerning municipal affairs, rule that taxing statutes must be strictly construed against taxing power did not restrict municipality's power to impose license taxes for revenue purposes, since charter was a limitation and restriction upon exercise of existing powers relating to municipal affairs rather than a grant of enumerated powers. St.1899, p. 249, art. 2, c. 2, § 1, subd. 15; St.1931, pp. 2978, 2991, §§ 2, 24; Const. art. 11, §§ 6, 8, as amended in 1914; Pol.Code, §§ 3366, 4041.14.

11. Licenses 🔑6(2)

Where city and county of San Francisco had adopted a charter embodying provisions of constitution as amended in 1914 respecting power of cities to make and enforce regulations concerning municipal affairs, and the only express limitation, contained in charter, upon right of municipality to impose license taxes for revenue purposes were directed to certain specified businesses, a limitation upon exercise of such power in respect to businesses not mentioned in charter could not be inferred. St.1899, p. 249, art. 2, c. 2, § 1, subd. 15; St.1931, pp. 2978, 2991, §§ 2, 24; Const. art. 11, §§ 6, 8, as amended in 1914; Pol.Code, §§ 3366, 4041.14.

12. Municipal corporations 🔑956(1)

Where city and county of San Francisco had adopted a charter embodying provisions of constitution as amended in 1914 respecting power of cities to make and enforce regulations concerning municipal affairs, the constitution, rather than the charter, was the source of municipality's power to levy taxes. St.1899, p. 249, art. 2, c. 2, § 1, subd. 15; St.1931, pp. 2978, 2991, §§ 2, 24; Const. art. 11, §§ 6, 8, as amended in 1914; Pol.Code, § 3366, 4041.14.

13. Licenses 🔑6(1)

Where city and county of San Francisco had adopted a charter embodying provisions of constitution as amended in 1914 respecting power of cities to make and enforce regulations concerning municipal affairs, the municipality acquired complete control over its municipal affairs, including power to levy license taxes for revenue purposes, and restrictions on exercise of such power were only the limitations and restrictions appearing in constitution and in charter. St.1899, p. 249, art. 2, c. 2, § 1, subd. 15; St.1931, pp. 2978, 2991, §§ 2, 24; Const. art. 11, §§ 6, 8, as amended in 1914; Pol.Code, §§ 3366, 4041.14.

14. Licenses 🔑6(2)

Where city and county of San Francisco had adopted a charter embodying provisions of constitution as amended in 1914 respecting power of cities to make and enforce regulations concerning municipal affairs and charter contained no express limitation upon or denial of power to impose license taxes for revenue purposes upon outdoor advertising companies, the municipality had implied power, by ordinance, to impose a license tax on such companies for revenue purposes, although there was no express grant of such power in the charter. St.1899, p. 249, art. 2, c. 2, § 1, subd. 15; St.1931, pp. 2978, 2991, §§ 2, 24; Const. art. 11, §§ 6, 8, as amended in 1914; Pol.Code, §§ 3366, 4041.14.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action by the West Coast Advertising Company against the City and County of San Francisco, a municipal corporation, to recover license taxes alleged to have been illegally collected. From a judgment for plaintiff, defendant appeals.

Reversed.

For prior opinion, see 87 P.2d 887.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellant.

Glensor & Schofield, of San Francisco, for respondent.

Harry C. Clausen, Hartley F. Peart, Howard Hassard, Harry G. Henderson, Rufus H. Kimball, and Simeon E. Sheffey, all of San Francisco, amici curiæ in support of respondent.

SHENK, Justice.

The plaintiff sued the City and County of San Francisco to recover license taxes paid during the years 1933 to 1936, inclusive. The judgment was for the plaintiff, and the defendant has appealed.

During the period involved, the plaintiff was engaged in the business of outdoor advertising, as defined in ordinance No. 4059 (new series) adopted by the board of supervisors of the city and county and approved by the mayor in 1917. Pursuant to that ordinance as amended in 1920 by ordinance No. 5133 (new series), and ordinance No. 5132 (new series), entitled "An Ordinance imposing License Taxes on Certain Businesses, Callings, Trades, or Employments within the City and County of San Francisco", as adopted in 1920, the plaintiff paid each quarter-yearly license fee of $90. On the trial of the action it was stipulated and found by the court that the tax paid by the plaintiff was a tax imposed for revenue only. The judgment for the plaintiff was based on the trial court's conclusion that the charter of the City and County of San Francisco does not authorize the imposition and collection of license taxes for revenue purposes.

On this appeal the defendant concedes that the charter provisions do not purport in express words to confer a grant of power upon the city to impose license taxes for revenue purposes. But the city contends that the present charter, which contains the provisions permitted by sections 6 and 8 of article XI of the state Constitution as amended in 1914, is an instrument of restrictions and limitations only; that no restriction appears therein upon the exercise of the taxing power evidenced by the ordinances here involved;

therefore that the power may so be exercised without an express grant thereof in the charter.

[1] The plaintiff relies in part upon the general state policy reflected in sections 3366 and 4041.14 of the Political Code to the effect that legislative bodies of counties and cities shall, for purposes of regulation and not otherwise, have power to license all and every kind of business not prohibited by law. It contends that because of those general laws and state policy, a specific grant in the present charter is necessary in order to confer taxing power for revenue purposes upon the City and County of San Francisco. In this connection the plaintiff cites City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965, which states the general rule that municipal corporations have only the powers, expressly conferred and such as are necessarily incident to those expressly granted or essential to the declared objects and purposes of the corporation.

Prior to 1914 the Constitution (art. XI, sec. 6) provided that cities and towns, except in municipal affairs, should be subject to and be controlled by general laws. The defendant's charter of 1899 was framed in conformity with the opinion then prevailing that a city charter must contain a specific grant of power with reference to its conduct of municipal affairs. That charter (subd. 15, sec. 1, ch. 2, art. II, Stats.1899, pp. 241, 249) contained an express grant of power to levy license taxes for revenue purposes. In re Higgins, 50 Cal.App. 533, 195 P. 740. The validity of ordinance No. 5132 (new series), above mentioned, as a measure imposing occupational license taxes for revenue purposes, was upheld in the Higgins case.

The amendment of section 6 of article XI of the Constitution, adopted in 1914, provided that cities and towns theretofore or thereafter organized by creating new charters or by amending existing charters, could become empowered "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws". At the same time the following sentence was included in an amendment to section 8 (providing the manner whereby a city having a designated population may frame and adopt a charter for its own government): "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

The history and the effect of the successive constitutional changes culminating in the privilege of autonomous rule for municipalities as it was extended by the 1914 amendments, has been traced and analyzed in various decisions of the courts and in special articles. See Fragley v. Phelan, 126 Cal. 383, 58 P. 923; Ex parte Helm, 143 Cal. 553, 77 P. 453; Civic Center Ass'n v. Railroad Commission, 175 Cal. 441, 166 P. 351; City of Long Beach v. Lisenby, 175 Cal. 575, 166 P. 333; City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745; Bank v. Bell, 62 Cal.App. 320, 217 P. 538; 11 Cal.Law Rev., pp. 91, 446.

Since the 1914 amendments to the Constitution San Francisco has adopted a new charter, called the charter of 1932. (Stats. 1931, pp. 2973, 2978.) Section 2 of that charter contains the following provision: "The city and county may make and enforce all laws, ordinances and regulations necessary, convenient or incidental to the exercise of all rights and powers in respect to its affairs, officers and employees, and shall have all rights and powers appropriate to a county, a city, and a city and county, subject only to the restrictions and limitations provided in this charter * * *. The specification or enumeration in this charter of particular powers shall not be exclusive. The exercise of all rights and powers of the city and county when not prescribed in this charter shall be as provided by ordinance or resolution of the board of supervisors." That section also provides that all ordinances or resolutions in force at the effective date of the charter and not inconsistent therewith shall continue in force until amended or repealed.

Section 24 of said charter, treating of "permits and inspections", is the section which states the limitations and restrictions upon the power to issue licenses. The pertinent portions of that section are as follows:

"The board of supervisors shall regulate, by ordinance, the issuance and revocation of licenses and permits for the use of, obstruction of or encroachment on public streets and places * * *; and for the operation of businesses or privileges which affect the health, fire-prevention, fire-fighting, crime, policing, welfare or zoning conditions of or in the city and county; and for such other matters as the board of supervisors may deem advisable. Such ordinance shall fix the fees or licenses to be charged, which shall be not less than the cost to the city and county of regulation and inspection * * *. The chief of police in the performance of police duties shall have power to examine at any time the books and the premises of pawnbrokers, peddlers, junk and second-hand dealers, auctioneers and other businesses designated by the board of supervisors, and the tax collector shall have power to examine the books of any business for which a license is issued and a fee charged on the basis of the receipts of such business. * * *

"No license tax shall be imposed on any seller or manufacturer of goods, wares or merchandise operating at a fixed place of business in the city and county, except such as require permits or licenses in accordance with or under authority of any local health, sanitary or other ordinance under the police power."

As noted, it is the plaintiff's contention that inasmuch as the foregoing section does not contain an express provision granting the right to impose license taxes for revenue purposes, and because so, it is claimed, a charter is a grant of power, the right to levy such taxes may not be implied.

[2-3] It is now established by a line of decisions of the courts of this state that a city which has availed itself of the provisions of the Constitution as amended in 1914 has full control over its municipal affairs unaffected by general laws on the same subject-matters, and that it has such control whether or not its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within the limitations or restrictions placed in the charter. Stege v. City of Richmond, 194 Cal. 305, 228 P. 461; Brougher v. Board of Public Works, 205 Cal. 426, 271 P. 487; Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434; Bank v. Bell, supra. As stated in In re Galusha, 184 Cal. 697, at page 700, 195 P. 406, at page 407, "The question, then, is not whether the charter grants the power to impose the tax, but whether it prohibits the tax, * *." Also in Re Nowak, 184 Cal. 701, 704, 195 P. 402, 403, it was said: "The net result * * * is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers, and, the imposition of the tax for revenue purposes being strictly a municipal affair, the city has the power to impose that tax unless the power was taken from it by the charter itself. [Citing cases.]"

[4] The foregoing cited cases leave no doubt that such a charter is no longer a grant of powers, but is rather an instrument which accepts the privilege granted by the Constitution of complete autonomous rule with respect to municipal affairs, and which otherwise serves merely to specify the limitations and restrictions upon the exercise of the powers so granted and accepted. Therefore any such power not expressly forbidden may be exercised by the municipality, and any limitations upon its exercise are those only which have been specified in the charter.

The decisions relied upon by the plaintiff such as City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965; Whitmore v. Brown, 207 Cal. 473, 279 P. 447; Fessier v. Campbell, 2 Cal.2d 638, 42 P.2d 1020; Griffen v. City of Los Angeles, 134 Cal.App. 763, 26 P.2d 655, and Richards v. Wheeler, 10 Cal.App.2d 108, 51 P.2d 436, were concerned either with charters which were framed as specific grants of power, rather than with limitations upon recognized existing powers; or, if the latter, the question was whether the power was one relating to a strictly municipal affair or was one controlled by general laws. For instance, in the case of Griffin v. City of Los Angeles, it was recognized (134 Cal.App. page 769, 26 P.2d page 658) that "the powers conferred upon the city of Los Angeles in municipal affairs are subject to charter restrictions only, and the enumeration therein of powers conferred do not constitute limitations thereon for such purposes". Likewise, in all the cases where the question of the effect of the 1914 amendments has been considered, the same recognition has uniformly been present.

[5] The plaintiff also places special reliance upon the case of City of Pasadena v. Charleville, supra. It urges the conclusion from the decision in that case that the present charter of the City and County of San Francisco was not drawn as an

acceptance of the general grant contained in the amended sections of article XI of the Constitution, and as an instrument of limitations and restrictions; but that it was framed as a grant of express powers. By an amendment to its charter in 1923 the city of Pasadena had availed itself of the privilege extended by sections 6 and 8 of article XI as amended. In that case it was said [215 Cal. 384, 10 P.2d 748]: "But it is not necessary that the charter specifically legislate on the subject. In order to remove the city's municipal affairs from the control of general laws it is sufficient if the city has availed itself of the offer extended to it by the Constitution as amended in 1914 and has incorporated in its charter an acceptance of the privilege tendered. [Citing cases.] Where in the one case the charter specifically legislates upon the subject it is deemed a grant of power; and where, on the other hand, the charter in general terms accepts the offer extended by the Constitution, the enumeration of powers is unnecessary and the general language of the acceptance becomes a limitation of the power of the city and is all-embracing so far as the removal of the municipal affairs of the city from the control of the Legislature is concerned." The court then called attention to the amendment to the charter, and stated: "This amendment was adopted in strict conformity with the amendment of section 6 of article 11 of the Constitution in 1914. The charter so amended is the fundamental law of the city, subject only, as to its municipal affairs, to the restrictions and limitations of the charter itself, and, of course, subject to the provisions of the Constitution which is the authority for its creation. * * * In none of the cases in this state has it been held that an enactment of the Legislature was controlling as to a municipal affair of a city which had in its freeholders' charter legislated on the subject or had availed itself by charter provisions of the offer of further autonomy extended by the 1914 amendment to the Constitution." It is obvious from the language used by the court in that case that there is no support therein for the conclusion drawn by the plaintiff, namely, that if the charter, which has adopted the privilege extended by the amendment of 1914, purports to enumerate some of the powers conferred upon the city, it is thereby reconverted into the type of instrument which it was the intention of the amendment to render unnecessary. On the contrary the courts have given effect to the obvious purpose of the amendment and have held, as noted, that the enumeration of some powers does not exclude the exercise of powers not enumerated except as limited by the charter and the Constitution. There is no contrary implication to be drawn from the decision in the case of Pasadena v. Charleville. Furthermore, by the quoted provisions from section 2, the defendant has accepted the grant of such general powers and has also expressly negatived the effect contended for by the plaintiff by providing that the enumeration of specific powers shall not be exclusive, and by reserving the right to exercise powers not enumerated.

[6-8] No doubt is entertained upon the proposition that the levy of taxes by a municipality for revenue purposes, including license taxes, is strictly a municipal affair. Ex parte Braun, 141 Cal. 204, 74 P. 780; Ex parte Helm, 143 Cal. 553, 77 P. 453; Ex parte Lemon, 143 Cal. 558, 77 P. 455, 65 L.R.A. 946; Ex parte Jackson, 143 Cal. 564, 77 P. 457; Trebilcox v. City of Sacramento, 91 Cal.App. 257, 265, 266 P. 1015. As such a municipal affair it must be deemed to have been included within the special grant and privilege tendered by the constitutional amendment in 1914 and later accepted by the city. A statement made in Ex parte Braun, supra, 141 Cal. at page 211, 74 P. at page 783 is just as applicable since the 1914 amendment as it was prior thereto. The statement follows: "It is, of course, true that the local power of taxation, like all other local powers, must have its origin in a grant by the state, and that it may at all times be controlled by the sovereign power. But it does not follow that the legislative department of the state may so control it. In the absence of constitutional provisions relating to the subject, the legislative department would necessarily have unlimited sway, and could, for the state, confer, modify, or withdraw the power, and prescribe such regulations as it saw fit for its exercise. The state Constitution, is, however, the highest expression of the will of the people of the state, and, so far as it speaks, represents the state. * * * The power of cities operating under freeholders' charters to raise money by taxation for municipal purposes does not find its source in any grant by the Legislature. There is no enactment of the Legislature purporting to vest such authority in such cities. Such power has been directly

granted by the people of the state by the provisions of the state Constitution."

[9] It follows that if the charter does not contain any limitation or restriction upon the power of the City of San Francisco to levy license taxes for revenue purposes, such taxes may legally be imposed and collected. An analysis of the pertinent charter provisions discloses that the framers thereof were careful to preserve rather than to prohibit the right to exercise the power here asserted by the city. There is no provision in the charter which denies the city's right to levy license taxes for revenue purposes on the business of the plaintiff herein. The plaintiff refers to the clause, "and for such other matters as the board of supervisors may deem advisable", appearing in the language of section 24 which places in the board the general regulatory power to issue and revoke licenses and permits. It contends that included within this quoted phrase only such other matters were contemplated as were similar and relevant to those particularized, namely, such as pertained to the exercise of the police power; and further that the inclusion of only such related purposes had the effect of restricting the power to issue licenses and permits to those issued for regulatory as distinguished from revenue purposes. However, it is manifest from the remaining language of the section that any particularization inferable from the quoted phrase was not intended to have the effect urged by the plaintiff. The concluding paragraph of the section singles out only sellers or manufacturers of goods, wares or merchandise operating at a fixed place of business upon whom license taxes may not be imposed except for "health, sanitary or other ordinance under the police power". As to all other businesses, including that of the plaintiff herein, no restriction appears upon the right of the city to impose license taxes for revenue purposes.

[10, 11] Further rules of construction invoked by the plaintiff are inappropriate here. The contentions in respect to such rules presuppose and are based upon the assumption that the charter is a grant of enumerated powers, rather than an instrument of limitations and restrictions upon the exercise of existing powers relating to municipal affairs. Inasmuch as it is the latter, the rule that taxing statutes must be strictly construed against the taxing power cannot, under the authorities hereinabove cited, have the effect to restrict the city's power to exercise the right except to the extent that such right is expressly limited by the provisions of the charter. Also, inasmuch, as the instrument is one of limitations and restrictions only, the rule expressio unius est exclusio alterius would not operate as contended by the plaintiff. The only express limitation upon the right to impose license taxes for purposes having been directed to include certain specified businesses, we may not infer a limitation upon the exercise of that power in respect to businesses not mentioned. Similar rules of construction were rejected in Re Nowak supra, 184 Cal. at page 707, 195 P. 402. Even if section 24 of the charter should, according to the plaintiff's view, be deemed an enumeration of powers, the provision of section 2 (that the specification or enumeration of particular powers shall not be exclusive), would preclude the application of such rules with the effect urged by the plaintiff.

[12-14] We therefore conclude that the Constitution and not the charter is the source of the city's power to levy taxes; that pursuant to the constitutional grant which has been accepted by the city, it has acquired complete control over its municipal affairs; including the power to levy license taxes for revenue purposes; that the restrictions on the exercise of that power are only the limitations and restrictions appearing in the Constitution and in the charter itself; and that inasmuch as the charter contains no express limitation upon the power to impose license taxes for revenue purposes upon the class of business conducted by the plaintiff herein, and taxes paid by it and herein sought to be recovered were not illegally imposed. It is not contended that the tax ordinance violates any provision of the Constitution.

The foregoing conclusion renders it unnecessary to discuss other questions presented.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; CARTER, J.; HOUSER, J.; GIBSON, J.

35 Cal.App.2d 211

PEOPLE v. SCOBEY.

Cr. 3232.

District Court of Appeal, Second District,
Division 2, California.

Oct. 19, 1939.

1. Criminal law 🔑789(4)

Instructions that, if evidence is susceptible of two contrary reasonable interpretations, jury must adopt interpretation proving defendant's innocence, that defendant is presumed innocent until proved guilty and entitled to acquittal if reasonable doubt exists, that jurors are not bound to decide in conformity with any number of witnesses' declarations which do not produce conviction as against presumption or other satisfying evidence, and that prosecution's failure to prove every material allegation of indictment beyond reasonable doubt, warrants acquittal fully and amply instructed jury on reasonable doubt. Pen.Code, §§ 1096, 1096a.

2. Criminal law 🔑807(1), 829(1)

Defendant's requested special instructions, which were either varying forms of statements of law in instructions given or mere arguments, were properly refused.

3. Criminal law 🔑829(3)

In forgery trial, refusal of instructions to acquit, if victim authorized defendant to write victim's name on, or victim herself signed, instrument involved, were properly refused after court gave instruction succinctly defining crime of forgery.

4. Criminal law 🔑815(4), 829(3)

In forgery trial, instruction, requested by defendant after giving of instructions defining forgery and prohibiting conviction unless jury were persuaded of defendant's guilt beyond reasonable doubt, that defendant could not be convicted, unless jury believed beyond such doubt that defendant wrote victim's signature on instrument involved with intent to defraud, was properly refused as superfluous and ignoring type of forgery committed by uttering forged instrument.

5. Criminal law 🔑829(12)

Rejection of defendant's proposed instructions as to manner of weighing evidence of her good character was not error, where instructions given stated law correctly and without conflict.

6. Criminal law 🔑1159(2)

The appellate court cannot assume that jury's determination of defendant's intent, on which her guilt of crime charged depended, was guess, but must assume that it was derived in jury's intelligence and conscience and accept jury's decision as returned in verdict of conviction.

7. Criminal law 🔑1159(1)

A jury's findings, when free from prejudicial error, constitute the "justice" which litigant must accept.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Margaret B. Connell Scobey was convicted of grand theft and forgery, and she appeals.

Affirmed.

Caroline R. Kellogg, of Los Angeles (Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, of counsel), for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

MOORE, Presiding Justice.

Defendant appeals from convictions upon thirty-three separate felonies—eleven counts for grand theft and twenty-two for forgery. She is past seventy-two years of age; has practiced law in California since 1920, having formerly resided in Utah and in Texas.

The offenses charged against her grew out of legal matters handled by her for one Lucy Du Bois and one Inez Goodman, two of her clients. She became attorney for each of these ladies in 1933, and continued to act for both until 1938. The reporter's transcript of her trial comprises many volumes. There is no intimation that the evidence was insufficient to warrant the convictions; no assignments of error upon the admissibility of evidence; no complaint as to the conduct of the district attorney. The sole basis of this appeal is the contention that the jury were not properly directed. The asserted errors consisted of two kinds, namely: first, failure of the court to instruct properly with respect to reasonable doubt; second, failure of the court to instruct properly with reference to the value of "character" as evidence in the case.

[1] (1) With reference to reasonable doubt, the jury were fully and amply instructed. While it was unnecessary to do more than read section 1096 of the Penal Code (sec. 1096a, Pen.Code), the jury were advised that if the evidence is susceptible of two contrary interpretations, both reasonable, they must adopt that interpretation proving innocence; that she is presumed innocent until guilt is proved and if a reasonable doubt exists, she is entitled to acquittal; that this rule governs even though an attorney's duty demands a greater degree of care than is required of the ordinary individual; that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction as against a presumption or other satisfying evidence; that every count is an alleged distinct offense; that the finding upon one count shall have no influence in considering another count. Following the instruction of "reasonable doubt," sec. 1096, Pen.Code—the only requisite instruction upon that subject, sec. 1096a, Pen.Code—the jury were finally told that the burden of proof is upon the prosecution to prove every material allegation and its failure to do so to a moral certainty and beyond a reasonable doubt warranted a verdict of not guilty. Also, the court defined with meticulous care the crimes of forgery, theft, larceny, trick and device, and distinguished those several crimes.

[2-4] All of the special instructions requested by the appellant were either varying forms of the statements of the law, as presented in the instructions given, and therefore needless, or they were mere arguments and, therefore, out of place. For illustration, after the crime of forgery had been succinctly stated by the court, what could be the virtue of following such definition with a statement that if the victim of the forgery gave appellant authority to write her name, the jury should acquit? Likewise, after such definitions, it would be absurd to instruct the jury to acquit the defendant if they believed the victim herself signed the instruments. Moreover, after definitions of forgery and the instructions that the defendant could not be convicted unless the jury be persuaded beyond a reasonable doubt, it were supererogation to say that the jury cannot convict for forgery unless they believe beyond a reasonable doubt that the defendant wrote the victim's signature with intent to defraud. Indeed, not only would that instruction have been superfluous but it ignored that type of forgery committed by uttering a forged instrument.

The instructions given have oftentimes, in substance, been approved following attacks similar to those here made. People v. Jackson, 97 Cal.App. 692, 276 P. 156; People v. Baker, 94 Cal.App. 628, 271 P. 765; People v. Galloway, 104 Cal.App. 422, 286 P. 476. In the Galloway case, it was held, after refusal of a similar instruction upon "reasonable doubt" that the reading of section 1096 of the Penal Code was sufficient. In the Baker case [94 Cal.App. 628, 271 P. 767], this court held that it is a rule of long standing that, having once given an instruction "it is not error to refuse to again state the law in the phraseology requested by the defendant".

[5] (2) Defendant's contentions with reference to the rejection of her proposed instructions as to the manner of weighing evidence of her good character are likewise unavailing. The instructions as read "correctly and without conflict stated the law". People v. Von Perhacs, 20 Cal.App. 48, 127 P. 1048, 1050; People v. Ridgeway, 89 Cal.App. 615, 265 P. 349; People v. Navarette, 21 Cal.App.2d 598, 69 P.2d 449. The instruction approved in the Navarette case was less favorable than that criticized by appellant here.

[6] (3) Defendant's hypothesis that her guilt depended upon her "intent" is true as in all cases of the misappropriation of entrusted funds or of the misuse of granted powers. But the only known means of ascertaining the undeclared intent of any actor is by our knowledge of human behavior. We cannot assume that the making of such determination is a "noble guess"; but rather, that it is derived in the intelligence and conscience of the jury. It is known to any qualified juror that, while intent is the fruitage of desire and is begotten of the wish, yet it is the motor of the will. The fact that it is difficult for any group by the processes of ratiocination to ascertain intent, notwithstanding the confusion of innumerable, heterogeneous acts, does not suspend the judicial doctrine which requires such a finding by the constituted tribunal. The details of the many years of faithfulness of this truant trustee having been dissected in the presence of, and inspected by, a jury impaneled and sworn, we are required to accept the decision solemnly returned in their verdict.

[7] A reply brief by the hand of the unfortunate prisoner is a diatribe assailing the conclusions of the jury and attempting to argue the evidence. The practice and the doctrine that the findings of the jury when free from prejudicial error, constitute the "justice" a litigant must accept, is too well settled for discussion. While her plea engenders our sympathy, it cast no new light upon the problem presented.

The judgment is affirmed.

We concur in the judgment: WOOD, J.; McCOMB, J.

---

35 Cal.App.2d 244

JOHNSTON v. CITY OF SAN FERNANDO et al.

Civ. 12271.

District Court of Appeal, Second District, Division 2, California.

Oct. 23, 1939.

1. New trial 🔑138

Under the statute requiring a person intending to move for a new trial to serve upon adverse party a notice of his intention so to do, the term "adverse party" includes every party whose interest in subject matter of motion will be affected by granting of motion. Code Civ.Proc. § 659.

[Ed. Note.—For other definitions of "Adverse Party," see Words & Phrases.]

2. New trial 🔑138

The superior court is without jurisdiction to re-examine issue of fact that has been tried and change its decision thereon unless all of parties to issue have been properly brought before it by serving the required notice of intention to move for new trial. Code Civ.Proc. § 659.

3. Indemnity 🔑13(1)

An employer against whom a judgment has been rendered for damages occasioned by unauthorized negligent act of an employee may recoup his losses in an action against employee.

4. Master and servant 🔑333

An employer may not be held for damages in a tort action after exoneration of employee where alleged negligent act of employee was not directed or ratified by employer and liability of employer resulted only from application of doctrine of respondeat superior.

5. Master and servant 🔑333

Where a new trial was granted to plaintiff after verdict for defendants in action against city and city employee for damages allegedly resulting from employee's negligence, but verdict in favor of employee was not affected by motion for new trial because of failure to serve employee with notice of motion, no judgment could be rendered against city, since city could not be held for damages after exoneration of employee in absence of ratification of negligent acts of employee. Code Civ.Proc. § 659.

6. Attorney and client 🔑88

Where a litigant has a duly employed attorney of record, that attorney retains exclusive right to appear and control proceedings at trial.

7. New trial 🔑138

In tort action against city and city employee, service of a notice of a motion for new trial on city attorney did not constitute service on employee where attorney for employee took an active part in trial, although city attorney cross-examined most of the witnesses, made most of the objections to testimony, and on some occasions waived rights of both defendants and entered into stipulations on behalf of both defendants.

8. New trial 🔑138

In tort action against city and city employee where both city and employee were represented by attorneys, fact that city attorney signed a stipulation as "attorney for defendants" did not establish that city attorney was authorized to act for employee so as to make service of notice of motion for new trial on city attorney a service of notice on employee, where employee did not authorize erroneous wording in stipulation and city attorney had no authority to sign a stipulation on behalf of a party he was not authorized to represent.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action for damages for injuries sustained in an automobile accident by Ralph H.

Johnston, Jr., suing by his guardian ad litem, R. H. Johnston, Sr., against the City of San Fernando (a municipal corporation), and C. A. Ward. From an order granting plaintiff a new trial after a verdict for defendants, defendants appeal.

Reversed.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles (John J. Ford, of Los Angeles, of counsel), for Appellant City of San Fernando.

C. Ransom Samuelson and Joseph A. Ball, both of Long Beach (Frank C. Charvat, of Long Beach, of counsel), for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries which he suffered when an automobile in which he was riding collided with an automobile driven by defendant Ward. At a jury trial it was stipulated that at the time of the collision defendant Ward was an employee of defendant City of San Fernando engaged in the performance of his duties as such employee. The jury returned a verdict in favor of defendants and thereafter the trial court granted a motion for a new trial "on the grounds of insufficiency of evidence to sustain the verdict". Defendants appeal from the order granting a new trial.

It is the contention of defendants that notice of intention to move for a new trial was not served upon defendant Ward and consequently the trial court was without jurisdiction to grant the motion for a new trial. Separate answers were filed by the defendants, the answer of defendant Ward being signed by attorneys Hill & Baumgarten and the answer of defendant city being signed by attorney C. A. Pinkham. At the trial attorney Baumgarten represented defendant Ward and defendant city was represented by attorney Elber H. Tilson, of the staff of attorney Joe Crider, Jr. No substitution of attorneys on behalf of defendant city appears in the record before us but this is immaterial since no claim is made that the service on attorney Crider was ineffective as regards the service of notice upon defendant city. The record discloses that the only service of notice of intention to move for a new trial was made upon attorney Joe Crider, Jr., which service was made by mail.

[1-5] It is made mandatory by section 659 of the Code of Civil Procedure that a party intending to move for a new trial shall serve upon the adverse party a notice of intention so to do. The term "adverse party" includes every party whose interest in the subject-matter of the motion will be affected by the granting of the motion. The superior court is without jurisdiction to reexamine an issue of fact that has been tried and change its decision thereon unless all of the parties to the issue have been properly brought before it by serving the required notice. Herriman v. Menzies, 115 Cal. 16, 44 P. 660, 46 P. 730, 35 L.R.A. 318, 56 Am.St.Rep. 81; Marshall & Sterns Co. v. Deneen Bldg. Co., 169 Cal. 229, 146 P. 684. Defendant Ward was not only interested in any judgment that might be rendered against himself but he was also interested in any judgment that might be rendered against his employer, defendant City of San Fernando. An employer against whom a judgment has been rendered for damages occasioned by the unauthorized negligent act of an employee may recoup his losses in an action against the negligent employee. Myers v. Tranquility Irr. Dist., 26 Cal.App.2d 385, 389, 79 P.2d 419. An additional reason why a new trial may not be ordered against defendant city upon failure to serve notice upon defendant Ward is founded in the rule that an employer may not be held for damages in a tort action after exoneration of the employee where the alleged negligent act of the employee was not directed or ratified by the employer and the liability of the employer results only from the application of the doctrine of respondeat superior. Davison v. Diamond Match Co., 10 Cal.App.2d 218, 51 P.2d 452; Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171. Since the judgment in favor of defendant Ward must stand for failure to serve him with notice of intention to move for a new trial it follows that no judgment can be rendered against his employer, defendant city. No appeal was taken from the judgment entered in favor of defendant Ward.

[6-8] Plaintiff does not question any of the principles above mentioned but argues that Mr. Tilson was authorized to act as attorney for defendant Ward and that therefore service upon Crider or Tilson was sufficient to confer jurisdiction on the trial court to grant the motion for a new trial. To uphold his contention he refers to the fact that his own attorney, Mr. Baumgarten, examined only two of the

witnesses and partially examined another, whereas Mr. Tilson examined and cross-examined all of the witnesses; Mr. Tilson made most of the objections to testimony and on a number of occasions waived the rights of both defendants and entered into stipulations on behalf of both defendants, Mr. Baumgarten remaining silent. After the notice of intention to move for a new trial was served upon Crider a stipulation was prepared in Crider's office by which it was stipulated that counsel for defendants might have until September 6, within which to file counter points and authorities. This stipulation was signed by plaintiff's attorney and by "Joe Crider, Jr., attorney for defendants".

We find nothing in the record to indicate that Mr. Ward took any action which would lead plaintiff to believe that he was being represented by Mr. Tilson or Mr. Crider. It is doubtless true that Mr. Tilson was the leading counsel at the trial and took a part which was far more active than the part taken by Mr. Baumgarten. The fact that Tilson stipulated that the jury was present and made other routine stipulations and later announced that the defendants rested their case, while Baumgarten remained silent, does not amount to an authorization from Ward to Tilson to act in his behalf. It is well known that such procedure is quite common in trials where the rights of the defendants are not adverse. Moreover, it appears that Mr. Baumgarten did in fact take active part in the trial, and personally entered into some of the stipulations. Mr. Ward was represented by Mr. Baumgarten, who alone could act for him. While a litigant has a duly employed attorney of record, that attorney retains the exclusive right to appear and control the proceedings at the trial. Electric Utilities Co. v. Smallpage, 137 Cal. App. 640, 31 P.2d 412. That the court recognized Mr. Baumgarten rather than Mr. Tilson as attorney for Mr. Ward is evident from the fact that on adjournment on one evening the adjournment was taken until 10:30 o'clock on the following morning so that Mr. Baumgarten might attend to a matter pending in another court. If Mr. Tilson had been representing Mr. Ward there would have been no reason for delaying the trial during Mr. Baumgarten's absence. The act of counsel for defendant city in signing the stipulation for additional time to file authorities in opposition to the motion for a new trial, "for defendants", is claimed by him to have been inadvertently done. Whether or not it was done inadvertently is immaterial since counsel for defendant city had no right to sign a stipulation on behalf of a party he was not authorized to represent. It is not shown that defendant Ward authorized the erroneous wording in the stipulation. Apparently counsel for plaintiff inadvertently omitted to serve counsel for defendant Ward with his notice of intention to move for a new trial, but such inadvertence, if it may be so called, was fatal in that it left the court without jurisdiction to grant the motion.

The order is reversed.

We concur: MOORE, P. J.; McCOMB, J.

---

35 Cal.App.2d 183

THEW SHOVEL CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 11148.

District Court of Appeal, First District,
Division 1, California.

Oct. 17, 1939.

Hearing Dismissed Dec. 14, 1939.

1. Corporations 🔑642(1)

The term "doing business" within statute governing service of summons on foreign corporations means the entry of the corporation into state other than that wherein it is incorporated for the purpose of transacting some substantial part of its ordinary business or of exercising some of the functions for which it was created. Code Civ.Proc. § 411.

[Ed. Note.—For other definitions of "Doing Business," see Words & Phrases.]

2. Corporations 🔑642(1)

The meaning of the phrase "doing business" within state within statute governing service of summons on foreign corporations is not to be confused with the same term when used in statute covering a different purpose or in proceeding involving different issues, and facts of each case must meet requirements essential to obtain jurisdiction under the applicable statute. Code Civ. Proc. § 411.

3. Corporations 🔑642(1)

The question whether manufacturing corporation was "doing business" within state within statute governing service of process on foreign corporations was not affected by question whether business conducted was interstate or intrastate. Code Civ. Proc. § 411.

4. Corporations 🔑642(1)

An agreement between foreign manufacturing corporation and distributor that distributor should not be deemed an agent of the manufacturing corporation was not binding on the court in determining whether manufacturing corporation was "doing business" within the state within statute governing service of summons on foreign corporations. Code Civ.Proc. § 411.

5. Corporations 🔑642(4½)

A foreign manufacturing corporation which at time cause of action arose sold products in state to distributor under agreement providing for sale of products shipped to distributor on consignment was "doing business" within state within statute at time cause of action arose and at time of service of process on agent of corporation authorizing service of process on agent of corporation notwithstanding that prior to service of summons, corporation discontinued payment of salary to district manager of territory including state where at such time corporation's products continued to remain on sale with distributor under agreement since distributor was not an "independent contractor." Code Civ.Proc. §§ 411, 1963, subd. 32.

[Ed. Note.—For other definitions of "Independent Contractor," see Words & Phrases.]

6. Corporations 🔑665(1)

To be subject to jurisdiction of state court, foreign corporation must be doing business in state at time of service of process. Code Civ.Proc. § 411.

7. Evidence 🔑67(1)

The status of "doing business" within state within statute governing service of process on foreign corporations, when once established, is presumed to continue unless controverted by other evidence. Code Civ. Proc. §§ 411, 1963, subd. 32.

8. Corporations 🔑668(7)

Mere service of process on an officer of a foreign corporation temporarily within the state is not sufficient to confer jurisdiction unless such officer at the time of service is actually transacting business in a representative capacity on behalf of the corporation. Code Civ.Proc. § 411; Civ.Code § 406a.

9. Corporations 🔑668(7)

Service of process on vice president of foreign corporation doing business in state was not void on ground that vice president was within state only temporarily and not in representative capacity where vice president was in state to attend convention to display wares and discuss problems pertinent to business of corporation, and to visit his grandmother and while in state vice president took part in conference relative to settlement of suit against corporation which counsel attempted to compromise several days later. Code Civ.Proc. § 411; Civ. Code § 406a.

10. Corporations 🔑668(7)

In action against foreign corporation doing business in state, summons was properly served on vice president of corporation while within state since vice president was official of sufficient representative capacity to insure corporation being duly and regularly advised of pendency of action in order that proper appearance could be made therein especially where, while within state, vice president had attempted to transact business of adjusting claim against corporation. Code Civ.Proc. § 411; Civ.Code § 406a.

11. Corporations 🔑668(4)

The purpose of statute providing for service of process directed to foreign corporation or person designated as agent for service of process on other designated officers is fulfilled if one of sufficient dignity is served to reasonably assure notice to the corporation. Civ.Code § 406a.

12. Corporations 🔑668(7)

An officer of a foreign corporation present in the state on official business relating to the matter on which he is served is amenable to process. Civ.Code § 406a.

Original proceeding by the Thew Shovel Company against the Superior Court of the state of California, in and for the City and County of San Francisco, for a writ of prohibition to restrain the Superior

Court from taking any further proceedings in connection with suit for damages for personal injuries by Fred Hudson against petitioner.

Writ denied.

Dinkelspiel & Dinkelspiel, of San Francisco, for petitioner.

R. G. Partridge and Wallace O'Connell, both of San Francisco, for respondent.

WARD, Justice.

Petition for a writ of prohibition to restrain the Superior Court of the City and County of San Francisco from taking any further proceedings in connection with a suit for damages for personal injuries brought by Fred Hudson against petitioner, following denial of petitioner's motion by special appearance to quash service of summons.

The petition is directed to the following points: Was the defendant corporation, petitioner herein, doing business in California at the time of the injuries to Hudson, and at the time of the service of summons, Code Civ.Proc., § 411, and was the service of process upon C. B. Smythe, its vice-president, made in pursuance of the provisions of section 406a, Civil Code?

[1, 2] The term "doing business" as used in section 411, Code of Civil Procedure, means the entry of a corporation into a state other than that wherein it is incorporated, for the purpose of transacting some substantial part of its ordinary business or of exercising some of the functions for which it was created. Estate of Wellings, 192 Cal. 506, 221 P. 628; Union Oil Associates v. Johnson, 2 Cal.2d 727, 43 P.2d 291, 98 A.L.R. 1499; Milbank v. Standard Motor Const. Co., 132 Cal.App. 67, 22 P.2d 271. It is not, however, to be confused with the same term when used in statutes having a different purpose or in proceedings involving different issues. The facts of each case must meet the requirements essential to obtain jurisdiction under the applicable statute. In State ex rel. v. Pioneer Creamery Co., 211 Mo.App. 116, 121, 245 S.W. 361, 363, the court said: "If the question relates to the right to serve process upon the corporation, or the right of the corporation to maintain action against a resident of this state, a different proposition is presented than is presented where it relates to the right and power of the state to impose conditions or restrictions upon the right of a foreign corporation to do business here." International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S.Ct. 944, 58 L.Ed. 1479.

At the time of the injury to Hudson occurring in connection with the use of equipment alleged to have been manufactured by the Thew Shovel Company, petitioner was represented in California by two "distributors", the Rix Company, Inc., in northern California, and the Le Roi Rix Machinery Company, Inc., in southern California. It was through the former company that the manufacturer sold the equipment in question. These distributors operated with the manufacturer under agreements providing in part as follows: That nothing therein should be represented or construed as constituting the distributor in any way the agent of petitioner. The distributor was granted the exclusive right to sell or buy for sale certain products in a defined territory, there being reserved to the manufacturer the right to conduct direct negotiations for the sale of its products in that territory. The manufacturer also reserved to itself exclusively the right to sell its products to governmental agencies and subdivisions thereof, also to other enumerated large users of its products for delivery into any territory, as well as to purchasers for export without paying or reserving to the distributor any discounts or commissions. In connection with sales by and for the account of the distributor, prices were fixed by the manufacturer and the conditions specified, all sales, however, to be consummated in the state of the distributor, subject to the approval of the manufacturer. Sales contracts for the account of the distributor of goods not paid for by him were to be assigned to the manufacturer as security, the distributor having the authority to receive and remit to the manufacturer notes and initial payments. In connection with consigned goods, the manufacturer was to retain title to the same and reserve the right to withdraw such goods to fill orders or to replace parts elsewhere. Such consignments were to be made to the distributor only, never to the manufacturer, their sale to be consummated between the distributor and the customer, the distributor assigning any contracts in connection therewith to the manufacturer, with the understanding "of course" that the manufacturer would accept the assignment and be bound by the provisions of the contract. Notes on account of deferred payments were to be taken in the distributor's name and endorsed to the manufacturer as security.

The manufacturer agreed to advertise its products through the medium of such recognized trade publications as in its opinion would secure the best results, printed matter furnished by the manufacturer to be distributed by the distributor at his own expense and to the best of his ability. In case the purchaser desired it, the distributor was to provide for installation service, but if an engineer was not available the manufacturer agreed to supply one, the cost of such service in either event to be paid for by the customer. The distributor was to collect down payments, assist in collecting instalments and in adjusting claims for defective parts, remitting to the manufacturer such amounts as were due; the manufacturer under its agreement being entitled to the services of at least one salesman assigned to this particular work. In connection with selling merchandise of this character and "keeping it sold", it is necessary that replacement service be readily available. This function was performed by the distributor, who replaced defective parts out of stock on hand, without direct authority from the manufacturer, returning the defective part to the petitioner for credit on the distributor's consigned merchandise account. The distributor was to make weekly written reports to the manufacturer of all prospects and of the status of transactions. The manufacturer thus received the attention of its duly recognized representative, and such consequent financial gain from the actual sale of its wares and products as if it had conducted an office under its own name in this state. In a memorandum, attached to the agreement, upon the subject of "Consignment Machines", we find the following: "The reason for this ruling covering consignment machines and their sale is to avoid the possibility of being involved in intra-state business where there might be evidence that we were doing business within the state without having taken out a license to do so. Some states have very peculiar laws in this respect, and to protect ourselves on deferred payment sales, it is absolutely necessary that the above procedure be religiously followed when a machine is sold from a consignment depot. By following the above procedure we maintain an 'Inter-State' status."

[3, 4] It appears that petitioner's desire not to be involved in intrastate business arose from its unwillingness to take out a license and to comply with attending tax regulations. Whether it succeeded in legally attaining its object is not necessary to pass upon in this proceeding. Suffice to say that whether the business conducted was interstate or intrastate makes no difference if petitioner was "doing business" in the state of California within the meaning of that term as used in section 411, Code of Civil Procedure. State ex rel. v. Pioneer Creamery Co., supra; International Harvester Co. v. Kentucky, supra; Knapp v. Bullock Tractor Co., D.C., 242 F. 543. The agreement that the distributor shall not be deemed an agent is not binding upon this court in determining whether petitioner itself was "doing business" in this state.

In the sale of the particular shovel involved in this proceeding, an old shovel had been taken over in part payment of the new, title to the old being taken direct by petitioner. The whole transaction was within the knowledge and with the approval of petitioner. The sale was made from consigned stock, through the joint efforts of petitioner and its distributor under the provisions of their agreement, the manufacturer accepting the assignment of the contract and absorbing part of the overvaluation on the trade-in so as to facilitate the sale; the balance of the purchase price was to be collected through their mutual efforts. The petitioner relied to a great extent upon the judgment and discretion of the distributor, and through their cooperation and coordination a substantial portion of petitioner's business was being conducted in this state; "the volume * * * might run between $150,000 and $300,000 a year".

[5-7] From the foregoing we conclude that the trial court was justified in determining that petitioner was transacting business in a substantial way in this state during the period when, according to the complaint, the alleged cause of action arose, and that the above activities constituted "doing business" as that term is used in section 411, Code of Civil Procedure. Chas. Ehrlich & Co. v. J. Ellis Slater Co., 183 Cal. 709, 192 P. 526; Davenport v. Superior Court, 183 Cal. 506, 191 P. 911; Winfield v. United Fruit Co., 135 Cal.App. Supp. 791, 24 P.2d 247; Milbank v. Standard Motor Const. Co., supra; Davis v. Motive Parts Corp., D.C., 16 F.2d 148; Murphy v. Campbell Soup Co., D.C., 40 F.2d 671; Knapp v. Bullock Tractor Co., supra; Cheli v. Cudahy Bros. Co., 260 Mich. 496, 245 N.W. 503; International Harvester Co. v. Kentucky, supra; Plibrico Jointless Fire-

brick Co. v. Waltham Bleachery & Dye Works, 274 Mass. 281, 174 N.E. 487.

The next question for consideration is whether or not the corporation was doing business in California at the time of service of summons in the case of Hudson v. The Thew Shovel Co. To be subject to jurisdiction it is necessary that a foreign corporation shall be doing business in the state at the time of the service of process. Jameson v. Simonds Saw Co., 2 Cal.App. 582, 84 P. 289. The status of "doing business" once established is presumed to continue unless controverted by other evidence. Code Civ.Proc., sec. 1963, subd. 32; San Francisco Breweries, Ltd. v. Superior Court, 80 Cal.App. 433, 251 P. 935.

At one time R. F. Deane held a position as "the district manager of what was known as the western territory, including California" for which he received a salary from petitioner. He testified in substance that during such period petitioner also conducted business here independently, without his presence or participation. Subsequent to the date of the alleged accident, petitioner discontinued paying a salary to Deane. It is petitioner's contention, assuming without admitting that it was doing business in California, that such business, if any, ceased when the salary to Deane was discontinued. The record discloses that the principal part played by Deane in the company's business here was to advise and assist in southern and sometimes in northern California in the sale of petitioner's stock in trade, and the record further shows that at the time of and subsequent to the service of summons petitioner's products continued to remain on sale with The Rix Company of northern California under an agreement similar in form and substance to the agreement in existence when the particular shovel referred to in this proceeding was sold. The distributor was not an independent contractor. Under such circumstances it appears that petitioner was doing business at the time of the service of summons. Carroll Electric Co. v. Freed-Eisemann Radio Corp., 60 App. D.C. 228, 50 F.2d 993; Milbank v. Standard Motor Const. Co., supra.

[8] The final contention of petitioner is that the service upon Smythe is void for the reason that he was within this state only temporarily and not in a representative capacity, and that he did not transact any business in California that would make petitioner through him amenable to service of process here. It is the accepted and approved rule that mere service upon an officer of a foreign corporation temporarily within a state other than that of its domicile is not sufficient to confer jurisdiction unless such officer at the time of service is actually transacting business in a representative capacity on behalf of the corporation. Nickerson v. Warren City Tank & Boiler Co., D.C., 223 F. 843; Knapp v. Bullock Tractor Co., supra; Spokane Merchants' Ass'n v. Clere Clothing Co., 84 Wash. 616, 147 P. 414; Premo Specialty Mfg. Co. v. Jersey-Creme Co., 9 Cir., 200 F. 352, 43 L.R.A.,N.S., 1015; State ex rel. Taylor Laundry Co. v. Second Judicial Dist. Court, etc., 102 Mont. 274, 57 P.2d 772.

[9] Smythe was the vice-president of petitioner corporation, the officer who signed the last agreement between petitioner and the Rix Company, likewise the officer who approved the contract of sale for the particular shovel referred to in this proceeding. It must be admitted that his presence in California was temporary, his purposes being to attend a convention of the American Road Builders Association held in San Francisco and thereafter to visit his grandmother in the southern part of California. Respondent claims that an inference may be drawn that the expenses of the trip were paid by petitioner corporation. We can find no evidence to substantiate this claim but, irrespective of how the expenses were met, the evidence shows that Smythe, in the company of another representative of petitioner corporation, was in attendance upon a convention being held to display wares and discuss problems pertinent to the business of petitioner corporation. Regardless of any pleasure attaching to his attendance upon the convention, the evidence shows that Smythe stepped out of that sphere and actually took part in a conference relative to a settlement of the suit brought by Hudson against the Thew Shovel Company, and several days later the San Francisco legal representative of petitioner corporation attempted to compromise the claim. We must agree with the evident conclusion of the trial court that at the time of the service of summons Smythe was present in this state as an official representing petitioner.

Petitioner contends that this one isolated instance of transaction of business by Smythe was not sufficient to make him amenable to process. In support of such contention petitioner cites a number of cases. In Apgar v. Altoona Glass Co., 92

N.J.Eq. 352, 113 A. 593, the court held that attendance upon a convention was not doing business and that the service was void unless there was proof that otherwise the corporation was doing business. In Walton N. Moore Dry Goods Co. v. Commercial Industrial Co., D.C., 276 F. 590 (affirmed in 9 Cir., 282 F. 21), service was made upon an officer of a Russian corporation temporarily within the state in an effort to settle a legal claim. In this case the governing contract had been made and was to be performed in Russia, not in California. It was held that the mere presence in this state of a representative of a foreign corporation for the purpose of adjusting a legal controversy was not sufficient, standing alone, to constitute doing business. A somewhat similar holding is found in Painter v. Colorado Springs & C. C. Ry. Co., 127 Mo.App. 248, 104 S.W. 1139. In Fox v. Hale & Norcross S. M. Co., 108 Cal. 369, 41 P. 308, service was made upon a mill superintendent in attendance upon the trial of the case; it was held that he was not attending to the business of the corporation. In Knapp v. Bullock Tractor Co., supra, it was held that the officer must be engaged in the state in a representative capacity for the corporation. In Vance v. Chicago Portrait Co., reported with the Knapp case, the court said that the party upon whom service was made appeared "purely in his private capacity on a pleasure trip". [242 F. 552.] Petitioner fails to distinguish between proof that the corporation was "doing business" and whether or not the representative was amenable to process.

[10-12] Having determined that the corporation petitioner was doing business in this state at the time of the service of the summons, the only question now before us is whether or not the party served was an official of sufficient representative capacity to insure the corporation defendant's being duly and regularly advised of the pendency of the Hudson action in order that proper appearance could be made therein. The party served was a vice-president and in addition thereto presumably acquainted with the general aspects of the case; he had for a period during his stay in California for pleasure assumed the role of an official in an attempt to transact the business of adjusting a claim against the corporation of which he was an officer. The purpose of section 406a, Civil Code, is fulfilled if one of sufficient dignity is served to reasonably assure notice to the corporation. Milbank v. Standard Motor Const. Co., supra; Denver & R. G. R. Co. v. Roller, 9 Cir., 100 F. 738, 49 L.R.A. 77. An officer of a foreign corporation present in this state on official business relating to the matter upon which he is served is amenable to process. Hand v. Superior Court of Los Angeles County, 42 Cal.App. 168, 183 P. 456; Premo Specialty Mfg. Co. v. Jersey-Creme Co., supra; Spokane Merchants' Ass'n v. Clere Clothing Co., supra.

The peremptory writ is denied.

We concur: PETERS, P. J.; GOODELL, J. pro tem.

35 Cal.App.2d 283

WATTERSON v. KNAPP et al.

Civ. 2443.

District Court of Appeal, Fourth District, California.

Oct. 23, 1939.

Hearing Denied Dec. 22, 1939.

1. Appeal and error ⚷1170(3)

Where complaint in suit for an accounting and division of assets of a joint adventure pleaded facts sufficient to constitute a cause of action, and record did not disclose that defendants had been injured by any defect in pleadings, on appeal District Court of Appeal would not reverse judgment for plaintiff on ground of technical defects, if any, in pleadings. Const. art. 6, § 4½.

2. Appeal and error ⚷1170(3)

Where complaint in suit for accounting and division of assets of joint adventure entered into to purchase lands failed to describe one tract of land which had been acquired by joint adventurers, but defendants were not misled or surprised by such omission, and proceeded to voluntarily litigate the issue respecting such land, and trial court's judgment disposed of the land, on appeal defendants could not obtain reversal of judgment on ground of defect in pleading, although plaintiff failed to offer a formal amendment as ordered by trial judge before trial. Const. art. 6, § 4½.

3. Joint adventures 🔑1

In suit for an accounting and division of assets of a joint adventure, evidence *held* sufficient to support finding of the existence of a joint adventure between plaintiff and defendants.

4. Joint adventures 🔑4(1)

The resemblance between a partnership and a joint adventure is so close that the rights as between joint adventurers are governed by practically same rules that govern partnerships.

5. Partnership 🔑340

Where there are no rights of creditors to be injuriously affected, it is not necessary to convert partnership assets into cash before partition of partnership property, but court may divide the partnership property and award a just proportionate share to each partner.

6. Joint adventures 🔑5(1)

Where evidence in suit for accounting and division of assets of a joint adventure entered into to acquire land showed that the only obligations of joint adventure consisted of portions of purchase price of parcels of land, together with accrued interest and taxes, and immediate payment of contracts of purchase could not be forced, and principal creditor was not affected by division of assets between joint adventurers and, due to market conditions at time of trial, lands could not have been sold advantageously, trial court was justified in dividing the property between the adventurers.

7. Joint adventures 🔑5(1)

Where dividing the property and quieting title to it came within issues presented by answer in suit for an accounting and division of assets of a joint adventure, that trial court divided respective parcels of land in question between joint adventurers and quieted the title of one against the other was not ground for complaint by defendants.

8. Joint adventures 🔑5(1)

In suit against a husband and his wife for an accounting and division of assets of a joint adventure, a judgment divesting wife of record title to some of the land in controversy and placing title in either plaintiff or husband was not open to objection by defendants when wife had joined with husband in written assignments and deeds of interests in various parcels of lands to plaintiff and wife knew of joint adventure and did not claim to be more than holder of bare record titles to parcels in controversy.

9. Joint adventures 🔑5(1)

In suit for an accounting and division of assets of a joint adventure, a finding to the effect that trial judge could not make an accounting between the joint adventurers and strike a proper balance on evidence before him was justified, where adventurers had contributed money and time to joint adventure but were unable to state how much of their money and time had been contributed.

10. Joint adventures 🔑5(2)

In suit for accounting and division of assets of a joint adventure entered into to acquire land, evidence showing cost of each parcel of land in controversy and values placed on parcels by each adventurer when discussing sales to a prospective purchaser, was sufficient to support finding of values of land in question, although there was no direct testimony as to its market value, especially when it appeared that there was no known market for the land.

11. Evidence 🔑113(8)

Where land in question in suit for an accounting and division of assets of a joint adventure had no established market value at time of trial, the cost of such land was some evidence of its value.

12. Evidence 🔑474(16)

An owner of property is competent to testify as to its market value.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Suit by T. G. Watterson against Wannell Knapp, otherwise known as Emmett Knapp, and others, for an accounting and division of the assets of a joint adventure. From a judgment for plaintiff, defendants appeal.

Affirmed with directions.

Benjamin Chipkin, of Los Angeles, for appellants.

Robert Richards, of Bishop (Ed. S. Green and Walter T. Casey, both of Los Angeles, of counsel), for respondent.

MARKS, Justice.

This is an appeal from a judgment in an action for an accounting and for a division of the assets of a joint adventure.

In 1925 plaintiff and Wannell Knapp associated themselves together in an undertaking which had as its principal object the purchase of land and rights to purchase land in Inyo and Mono counties with the expectation of selling this property at a profit to the water department of the city of Los Angeles. Both devoted some time and money to the enterprise. Fee title to two tracts was acquired. Certificates of purchase of a number of parcels of state lands were also obtained. Title, or the purchase right, was taken in plaintiff's name to two parcels. The larger number were taken in the name of Wannell Knapp, who, with June Knapp, his wife, immediately assigned or conveyed an undivided one-half interest in the certificates and the lands to plaintiff in the case of almost every purchase. Through the ten years the joint adventure was operated, Mr. Knapp, through mesne conveyances, placed title in his wife to all certificates and the lands originally standing in his name.

[1] The first contention of defendants is that the demurrer to the complaint should have been sustained. It must be admitted that some of the grounds of special demurrer were well taken. However, the complaint did state facts sufficient to constitute a cause of action to terminate the joint adventure and for an accounting between the parties which constituted the principal relief sought. We have studied the entire record and have failed to discover any injury suffered by defendants from any defects in the pleadings. The issues were clearly understood during the trial and all the competent evidence in possession of both parties was offered and admitted. We are prohibited by the Constitution, art. VI, sec. 4½, from reversing a judgment because of technical defects in a pleading where prejudice did not result therefrom.

The complaint failed to describe one tract of land acquired by the joint adventurers. When plaintiff started to introduce evidence concerning this land he was met by an objection from defendants. The trial judge ordered the pleading amended so as to contain a description of this land and proceeded to take evidence concerning it. No formal amendment was filed but the judgment disposed of this land.

[2] Clearly, this property was an asset of the joint adventure. Defendants were neither misled nor surprised by the omission of the description in the pleading and were not prejudiced by the ruling of the trial court. After such ruling they proceeded to voluntarily litigate this issue and under these circumstances should not now secure a reversal of the judgment because of this correctible defect in the pleading.

A similar situation was considered in French v. McCarthy, 125 Cal. 508, 58 P. 154, 155, where it was said: "* * * the court was authorized to permit the amendment. The failure to make it formally upon the record does not necessitate a reversal of the judgment. The record can still be corrected to conform with the order permitting the amendment. Alameda County v. Crocker [125 Cal. 101], 57 P. 766."

[3] Defendants urge that the evidence is insufficient to support the finding of the existence of a joint adventure. This contention is without the slightest merit. Plaintiff testified in great detail to it. Knapp admitted it. Mrs. Knapp wrote letters recognizing it. A finding that there had been no joint adventure would have been contrary to the great weight of the evidence.

Defendants urge that the trial court erred in dividing the respective parcels of property between the joint adventurers and in quieting the title of one against the other. In this connection it should be observed that defendants in their answer sought the following relief: "In the alternative that if the Court finds that plaintiff has any right, title or interest in the property described herein, said property be divided and partitioned between the rightful owners or title quieted in the respective owners."

[4] It is well settled that "the resemblance between a partnership and a joint adventure is so close that the rights as between adventurers are governed practically by the same rules that govern partnerships". Keyes v. Nims, 43 Cal.App. 1, 184 P. 695, 699. See, also, Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601; Irer v. Gawn, 99 Cal.App. 17, 277 P. 1053.

[5] Where there are no rights of creditors to be injuriously affected, it is not necessary to convert the assets of a partnership into cash before partition of the partnership property. The court may divide the partnership property and award a just proportionate share to each partner. Vasiljevich v. Randanovich, 138 Cal.App. 97, 31 P.2d 802; Harper v. Lamping, 33 Cal. 641; Shuken v. Cohen, 179 Cal. 279, 176 P. 447. In view of the similarity of a joint adven-

ture to a partnership the same rule should be applied here.

[6] The evidence shows that the only obligations of the joint adventure consisted of the portions of the purchase price of parcels of land together with accrued interest and taxes. The contracts of purchase were not collectible at any particular time and immediate payment could not be forced. The principal creditor (the state) was not affected by the division of the assets between the joint adventurers. Further, it fully appears that due to market conditions at the time of the trial the lands could not have been sold advantageously. Under these circumstances the trial court was justified in dividing the property between the adventurers.

[7] Dividing the property and quieting title to it came within the issues presented by the answer, if not those raised by the complaint Defendants cannot complain because the trial court granted the relief for which they particularly prayed.

Defendants complain because the judgment divested Mrs. Knapp of the record title to some of the land and placed it in either plaintiff or Mr. Knapp.

[8] As we have observed, Mrs. Knapp joined with her husband in written assignments and deeds of interests in various parcels of lands to plaintiff. These documents and her letters show that she knew of the joint adventure, of many of its properties and of plaintiff's interest in them. The evidence does not suggest that she ever claimed to be more than the holder of the bare record title to the various parcels, except to one which she was permitted to keep. Under these circumstances she was merely a trustee holding the record titles to various parcels for the joint adventurers. She was not prejudiced by being divested of those bare record titles.

[9] Defendants complain of a finding to the effect that the trial judge could not make an accounting between the joint adventurers and strike a proper balance on the evidence before him. The evidence would support no other finding. As we have observed, both adventurers contributed money and time to the joint adventure, but how much of either, neither could say. If there was an advantage in the division of the properties it was in favor of Knapp. He received property of a total value considerably in excess of that awarded to plaintiff.

[10] The trial court found the values of the various parcels of property which belonged to the joint adventure. Defendants urge that these findings of values are entirely lacking in evidentiary support.

A study of the record discloses that there was no direct testimony introduced at the trial as to the market value of any of the parcels of land. However, it does appear that there was no known market for the land at that time and that there was no prospect of any sales of the land in question, nor had there been recent sales of other similar property; that, therefore, the land had no established market value.

[11, 12] There is evidence of the cost of each parcel of land. Where, as here, the property in question had no established market value at the time of the trial, its cost was some evidence of value. 10 Cal.Jur. 864, and cases cited; Haley v. Traeger, 92 Cal. App. 360, 268 P. 459; Davis v. Fyfe, 107 Cal.App. 281, 290 P. 468; Tatone v. Bing, 12 Cal.App.2d 543, 55 P.2d 933. There is also evidence of the values placed on various parcels of the property by each adventurer when discussing sales to the city of Los Angeles. There are also a number of letters written by the parties in which values and selling prices of various parcels of the joint adventurers' lands and other similar lands were stated and discussed. It is well settled that an owner of property is competent to testify as to its market value.

While the evidence on the question of market value is far from satisfactory, with this evidence in the record we cannot conclude that there was no evidence upon which the trial court could determine and find the values of the various parcels of land involved in this controversy.

The judgment is affirmed with directions to the trial court to cause the complaint to be amended in accordance with its order made at the trial, as of the date when such order was made.

We concur: BARNARD, P. J.; GRIFFIN, J.

35 Cal.App.2d 239

KRAMER v. SUPERIOR COURT IN AND FOR CALAVERAS COUNTY.

Civ. 6353.

District Court of Appeal, Third District, California.

Oct. 20, 1939.

As Modified on Denial of Rehearing Nov. 18, 1939.

Hearing Denied Dec. 18, 1939.

1. Appeal and error ⚷1199, 1202

Where trial court entered judgment in quiet title suit in exact form directed by District Court of Appeal, it exhausted its jurisdiction to entertain motion for new trial, to modify or change such judgment in any material manner, or to interfere with right of ownership and possession of mining claim under such judgment, by recalling and quashing writ of restitution or otherwise. Code Civ.Proc. § 953a.

2. Prohibition ⚷28

In prohibition proceeding to prevent trial court from setting aside judgment quieting titles to mining claims, which had been entered pursuant to direction of appellate court, and from entertaining motion for new trial or interfering with the right to restitution and possession, District Court of Appeal could not interfere with regular trial and determination of separate issues involved in another suit wherein plaintiff was seeking to establish an easement for the use of pipe-line across mining claim, since the other suit should be decided on its own merits.

3. Appeal and error ⚷1170(10)

The fact that trial court's judgment in suit to quiet title to mining claims, and finding of reviewing court on appeal, did not adopt specific findings concerning time and place of location of point of original discovery of quartz, did not make the judgment fatally defective where the question was merely incidental and finding would necessarily have been adverse to unsuccessful parties. Const. art. 6, § 4¾; Code Civ.Proc. §§ 953a, 956a.

4. Appeal and error ⚷1199, 1202

In suit to quiet title to mining claims, wherein plaintiff specifically disclaimed any right or title to that portion of claim which was awarded to defendants by amended judgment directed by reviewing court, more specific finding concerning defendants' ownership of such portion was unnecessary and lack of such finding did not authorize trial court to entertain motion to set aside the judgment or for new trial. Const. art. 6, § 4¾; Code Civ.Proc. §§ 953a, 956a.

Prohibition proceeding by Charles W. Kramer against the Superior Court in and for the County of Calaveras, State of California, to prevent the court from entertaining or determining a motion to set aside judgment and motion for new trial in quiet title suit, and from interfering with right to restitution and possession of mining claim.

Writ of prohibition granted.

Joseph H. Huberty, of San Andreas, for petitioner.

Virgil M. Airola, of San Andreas, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

By means of a writ of prohibition the petitioner seeks to prevent the trial court of Calaveras county from entertaining or determining a motion to set aside a judgment entered by direction of the appellate court and a motion for new trial therefrom, filed by the appellants against whom a suit to quiet title to certain mining claims had been determined. This petition also seeks to prohibit the trial court from interfering with the right to restitution and possession of the mining claim which was adjudged to belong to the respondent in that case.

It appears that Chas. W. Kramer brought suit against Mr. and Mrs. Sanguinetti to quiet title to the Buckhorn Lode Mining Claim in Calaveras county. The defendants answered the complaint, claiming title to that property. In a cross-complaint the defendants also asserted title to their Chaparral Placer Mining Claim, which to some extent overlapped the Buckhorn claim. One of the issues in that suit was the location of the point of discovery of quartz on the Buckhorn claim. After trial by the court sitting without a jury, findings were adopted to the effect that all of the allegations of plaintiff's complaint were true; that "plaintiff is the owner and entitled to the possession of the Buckhorn Lode Mining Claim described in his complaint" and that the defendants had no right, title or interest therein. Judgment was rendered accordingly in favor of the plaintiff. The trial court did, however, fail to adopt specific findings with respect to the affirmative allegations of the defendants' cross-complaint with respect to their Chaparral Mining Claim. On appeal to this court the findings and judgment of the trial court were approved in every respect.

Kramer v. Sanguinetti, Cal.App., 91 P.2d 604. On the theory that the appellants were entitled to findings and a judgment on their cross-complaint quieting title in them to such portion of their Chaparral claim as did not overlap the Buckhorn claim, on the authority of article VI, section 4¾ of the California Constitution, section 956a of the Code of Civil Procedure and Tupman v. Haberkern, 208 Cal. 256, 268, 280 P. 970, this court adopted the following additional finding [91 P.2d 609]:

"Defendants are the owners and entitled to the possession of all that portion of their Chaparral Placer Mining Claim in Calaveras County, California, described in the cross-complaint which does not overlap or conflict with the description of plaintiff's Buckhorn Lode Mining Claim, as it is described in the complaint."

The judgment was modified by adding thereto a clause quieting title in defendants to such portion of their Chaparral claim as did not overlap the Buckhorn claim. The original form of the judgment of the trial court was not changed in any respect. This court then directed the trial court to enter judgment "in accordance with the foregoing opinion". It is conceded on this hearing that the trial court entered judgment in the exact form directed by the appellate court. The only modification of the original judgment of the trial court which occurred was favorable to the appellants. It quieted title in appellants to the Chaparral claim which was involved in that suit, except that portion which overlapped the Buckhorn claim, which was specifically found to be the property of the defendants. A hearing of that appeal was subsequently denied by the Supreme Court.

After the modified judgment had been entered as directed, the appellants filed a motion to set the judgment aside, but conceded that it was in the exact form directed by the appellate court. They also filed a motion on all statutory grounds for a new trial from that directed judgment. The trial court also set aside the writ of restitution which was regularly issued in this proceeding, and has cited this petitioner in another proceeding to show cause why he should not be punished for contempt for asserting title to certain water rights appurtenant to the Buckhorn claim.

[1, 2] The appeal to this court under section 953a of the Code of Civil Procedure from the judgment quieting title in the case of Kramer v. Sanguinetti, supra, presented all the necessary issues which are involved in this proceeding. The trial court having entered the judgment in the exact form directed by this court exhausted its jurisdiction to entertain a motion for new trial from that directed judgment, to modify or change that judgment in any material manner or to interfere with the plaintiff Kramer's right of ownership and possession of the Buckhorn claim, by recalling and quashing his writ of restitution or otherwise (Phillips v. Patterson, Cal. App., 93 P.2d 807), except that this court may not interfere in this proceeding with the regular trial and determination of the separate issues involved in the former case of Jack Sanguinetti v. A. Kramer et al., No. 2212, now pending in the Superior Court of Calaveras County, in which the plaintiff attempts to assert title to certain water rights by prescription or adverse possession of water flowing from a spring through a pipe-line from Wet Gulch No. 1, over and across the Buckhorn claim, which water rights are alleged to have been used "for many years last past", for domestic purposes in his dwelling house on the Chaparral claim. The last-mentioned suit involves issues independent of, and which were not presented or determined in the suit to quiet title to the Buckhorn claim. They affect the right to a portion of the water from a spring which is not located on the Buckhorn claim, but which merely flows through a pipe-line across that claim. It is a separate suit to establish an easement for the use of the pipe-line to convey water from the spring across the Buckhorn claim to the premises of the plaintiff. We are of the opinion the suit to determine such water rights should be decided on its own merits.

[3, 4] The respondent in this proceeding contends that the judgment which was rendered by the trial court in the suit to quiet title is fatally defective for the reason that specific findings were not adopted with respect to the time and place of the location of the point of original discovery of quartz on the Buckhorn claim, and that the finding of the appellate court under section 956a of the Code of Civil Procedure of the Sanguinettis' ownership and title to their Chaparral claim also fails to specifically determine the question of the time and place of the location of the original discovery of quartz, and that its finding in regard to ownership of the last-mentioned claim is a mere conclusion. There is no merit in that contention. The findings of the trial court necessarily in-

cluded a determination that the point of discovery of the quartz-bearing rock was on the Buckhorn claim favorable to plaintiff. The point of discovery of quartz and the time and place thereof were merely incident to Kramer's ownership and right to the possession of the claim. A specific finding on that question of fact would necessarily have been adverse to the defendants. The defendants were therefore not prejudiced by that omission. Kramer v. Sanguinetti, supra. Nor was a more specific finding necessary regarding defendants' ownership of that portion of their Chaparral claim which does not overlap the Buckhorn claim. Gruwell v. Rocca, 141 Cal. 417, 74 P. 1028. The plaintiff specifically disclaims any right or title to that portion of the Chaparral claim which was awarded to the defendants by the amended judgment.

The writ of prohibition is granted, and the trial court is restrained from entertaining or determining the respondent's motion for new trial from the directed judgment, from interfering with the petitioner's right to issue and prosecute his writ of restitution and from interfering in any manner with his adjudicated title and right of possession to the Buckhorn claim.

We concur: PULLEN, P. J.; TUTTLE, J.

35 Cal.App.2d 215

PEOPLE v. ZOFFEL.

Cr. 2052.

District Court of Appeal, First District, Division 1, California.

Oct. 20, 1939.

As Modified on Denial of Rehearing Nov. 4, 1939.

Hearing Denied Nov. 16, 1939.

1. Conspiracy 🔑47

Proof of conspiracy to practice medicine without a license was not evidence of a conspiracy to commit abortions. St.1913, p. 722, as amended.

2. Criminal law 🔑508(9)

The fact that much of coconspirator's testimony may have been false did not serve to prove as against alleged conspirator either the fact of the existence of the conspiracy or of alleged conspirator's connection therewith.

3. Criminal law 🔑317

The burden rests on the prosecution and not the defense, and hence the failure of alleged conspirator to take the stand and deny having written cards which were found in apartment of coconspirator did not raise any presumption or inference of guilt.

4. Criminal law 🔑721(1)

The constitutional provision permitting the prosecution to comment on the failure of accused to take the stand cannot be used to supply a failure of proof by the prosecution. Const. art. 1, § 13.

5. Criminal law 🔑410

An argument between prosecutor and attorney for accused over the admissibility of certain exhibits, wherein counsel for accused stated that he did not know whether the exhibits were in handwriting of accused, but that that would come out in due time, and that if they were in her handwriting he would frankly admit it, was not tantamount to an admission that the exhibits were in handwriting of accused, as foundation for introduction thereof.

6. Criminal law 🔑419(12)

Where alleged conspirator was not present when cards were found in apartment of coconspirator, was not proved to have ever been in the apartment, and no evidence was offered that they were in her handwriting, the cards were hearsay as to her.

7. Criminal law 🔑404(4)

Where Christmas and birthday cards found in the apartment of coconspirator with the name of alleged conspirator thereon were not connected up with alleged conspirator, the cards were not admissible against her under the doctrine of the "footprint" cases.

8. Conspiracy 🔑45

Evidence is admissible that those charged with being coconspirators were intimate, at least where acquaintanceship is denied, but the evidence proving intimacy must conform to established rules of evidence.

9. Criminal law 🔑442

In prosecution for conspiring to commit illegal abortions, where prosecution made no attempt to prove that Christmas and birthday cards found in apartment of coconspirator came from alleged conspirator, or were similar to cards used by her or that handwriting thereon was that of alleged conspirator, the cards were improperly admitted.

10. Conspiracy ⚷47

Testimony merely creating an inference that alleged conspirators were acquainted did not of itself prove the existence of a conspiracy between them.

11. Criminal law ⚷407(1)

An out-of-court accusation identifying alleged conspirator as one associated with coconspirator was not evidence of the truth of the accusation.

12. Criminal law ⚷407(1)

When an out-of-court accusation is made, it is not the accusation, but the conduct of the accused, that is evidence, and the accusation is merely admitted to explain the conduct of the accused.

13. Criminal law ⚷407(1)

Where the accused denies an out-of-court accusation, the accusation should not be admitted, unless admissible on other grounds.

14. Witnesses ⚷380(5), 397

Under proper circumstances, where the prosecution is both surprised and damaged, testimony that a prosecution witness made out-of-court inconsistent statements may be admitted for impeachment purposes, but the evidence so admitted is solely for impeachment and does not prove the facts contained in the inconsistent statements. Code Civ. Proc. §§ 2049, 2052.

15. Criminal law ⚷407(1)

In prosecution for conspiring to commit illegal abortions, where aside from out-of-court identification by apartment house manager and husband, which they repudiated at trial, there was no evidence connecting accused with apartment occupied by coconspirator, and where accused had immediately denied the out-of-court accusation, accusation was inadmissible.

16. Conspiracy ⚷47

A cab driver's testimony that he transported victim of abortion operation to hospital, that, as victim got into cab, companion whom driver identified as accused said, "Well, goodbye and good luck," merely tended to prove that accused was an accessory after the fact to the crime of conspiring to commit illegal abortions, but neither proved conspiracy charged nor connection of accused therewith.

17. Conspiracy ⚷47

Testimony tending to connect accused with victim of abortion operation after the abortion was committed, while raising a suspicion, did not prove the fact of a conspiracy or participation of accused therein.

18. Conspiracy ⚷47

In prosecution for conspiring to commit illegal abortions, testimony which raised but a suspicion of guilt was insufficient to sustain conviction, notwithstanding that evidence justified inference that accused and individual by whom operation was allegedly performed were acquainted and that other testimony tended to connect accused with victim after the abortion was committed.

◆

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Frances Zoffel was convicted of conspiring to commit illegal abortions, and she appeals.

Reversed, and cause remanded for new trial.

Hearing denied; SHENK, CURTIS, and GIBSON, JJ., dissenting.

Walter McGovern, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PETERS, Presiding Justice.

Defendant appeals from a judgment of conviction finding her guilty of conspiring to commit illegal abortions, and from the trial court's order denying her motion for a new trial. The same indictment charged her with the murder of Doris Alexander, the victim of an abortion. On this charge she was found not guilty. Her coconspirator, as charged in the indictment, was one Clayton E. May, who was found guilty on both the conspiracy and murder counts. He has not appealed.

As disclosed by the indictment, it was the theory of the prosecution, so far as the conspiracy count is concerned, that May, who formerly was a doctor in the east, but who had been there convicted of the felony of harboring a fugitive from justice, and who, after serving his sentence, came to California but was not here admitted to practice, engaged in a conspiracy with appellant Zoffel, as his nurse, to commit an unlawful abortion on Doris Alexander and other unnamed women in

San Francisco. The overt acts set forth in the indictment can be summarized as follows: It is charged that in pursuance of the conspiracy, May and appellant rented and occupied apartment No. 20 in a designated apartment house located on Larkin street, San Francisco; that subsequently they moved to and occupied apartment No. 12 in the same building; that from August, 1937, to April, 1938, the two conspirators paid the rent for said apartment; that May assumed the alias of Cy Dalton; that appellant Zoffel assumed the alias of Miss Ralston; that they falsely represented appellant Zoffel to be the sister of May; that during the period mentioned, certain window curtains were sent to be cleaned by the conspirators; that they procured and had in their possession certain surgical instruments used for the purpose of causing abortions; that during the period mentioned the two conspirators committed unlawful abortions upon certain women whose names and numbers are unknown; that they did commit an unlawful abortion on one Doris Alexander. The murder count, on which May was convicted and appellant acquitted, charged the unlawful killing of Doris Alexander.

On this appeal it is appellant's main contention that there is not sufficient evidence in this record to sustain her conviction on the conspiracy charge.

The record shows that on April 12, 1938, May performed an unlawful abortion on Doris Alexander in apartment No. 12 of the apartment house named in the indictment, and that as a direct result of the operation Mrs. Alexander died on April 20th in St. Joseph's Hospital in San Francisco. Just prior to Mrs. Alexander's arrival at the hospital on April 12th, one of the physicians there received a telephone call from an unidentified woman telling him that a doctor had just completed an operation on a patient and that some damage had been done to her uterus. The doctor told the woman to have the patient sent to St. Joseph's Hospital. Mrs. Alexander was admitted to the hospital on the evening of April 12th and as a result of the story she told her husband and the police, May was arrested in the apartment on the afternoon of April 13th. In the apartment were found a table fixed up as an operating table and many surgical instruments and medicines used for performing abortions. There was also discovered in the kitchen of the apartment parts of a human fetus about three or four months old, which was not the fetus taken from Doris Alexander. The prosecution made no attempt to connect this fetus with an unlawful abortion. After his arrest, May was taken to the hospital where Mrs. Alexander at least partially identified him. It should be here mentioned that, although Mrs. Alexander, during the eight days she was in the hospital, talked to her husband, the police, and hospital employees, there is no evidence that she ever mentioned that Mrs. Zoffel or any other woman participated in the abortion, was present when it was performed, or had anything to do with it. At no time did she mention Mrs. Zoffel, or indicate that she knew her.

Mrs. Zoffel, although known to the police, being then on probation following a conviction of the crime of conspiracy to commit abortions, was not arrested until April 20th, the day Mrs. Alexander died. At the time of her arrest, and at all times since her arrest, she has consistently maintained her innocence.

Respondent contends there was ample evidence to prove both the conspiracy charged, and appellant's participation therein. In this connection the following evidence is relied on:

[1, 2] May took the stand in his own defense. He denied that he had committed any abortions, but admitted that he had entered into a conspiracy with his nurse to practice medicine without a license. Obviously, proof of conspiracy to commit that crime is no evidence of conspiracy to commit the crime charged, namely, conspiracy to commit abortions. He further testified that the name of his nurse was Evelyn Fontaine and that she was not the defendant Zoffel whom he denied knowing. He further testified that he had come to San Francisco in April, 1937, after completing his sentence for harboring John Dillinger; that the notoriety resulting from that conviction induced him to change his name to Dalton; that he was engaged in the business of promoting a feminine hygiene tablet; that at a party on Bush street he was introduced to Evelyn Fontaine by a former eastern acquaintance, Mrs. Luella Johnson; that he told Miss Fontaine of the tablet; that she told him she knew he had treated many cases of venereal diseases, and asked him if he wanted her to send him some work; that after seeing her several times he agreed to rent the apartment and to treat the cases brought to him; that about three months

after meeting Evelyn they began to live together and moved from apartment No. 20 to apartment No. 12, a larger apartment; that Evelyn had brought him forty-five or fifty cases to treat; that she had left the apartment about fifteen minutes before the police arrived on April 13th to arrest him; that he did not know where she had gone and had not since heard from her. He denied committing the abortion on Doris Alexander, but admitted a woman came to his apartment on the afternoon of April 12th; that she told his nurse an abortion had been committed by another doctor; that he told his nurse to tell the woman to go to the hospital for treatment. He denied that Evelyn Fontaine and Frances Zoffel were the same person, and he denied any acquaintanceship with the defendant. He did admit a friendship with Mrs. Zoffel's son by a former marriage—Raymond Brandt. He testified that he first met Brandt when the latter was working as a bartender at a bar near his apartment; that later Brandt had a laundry route and handled his laundry; that Brandt became interested in the hygiene tablet; that Brandt offered to put up a thousand dollars; that Brandt deposited the money in the bank subject to May's approval of a contract; that the contract was not approved; that May knew Brandt was getting the money from his mother; that he had arranged with Brandt to have his mail sent to an address given him by Brandt, which the evidence shows was the residence of appellant and not Brandt's home. In the apartment at the time of his arrest was found a letter addressed to Cy Dalton, the envelope containing the address of appellant. May testified that this letter had been delivered to him by Brandt.

It is obvious from this summary of May's testimony that, although he admitted entering into a conspiracy with his nurse to violate the Medical Practice Act, St.1913, p. 722, as amended, there is not one word therein which directly or indirectly tends to prove that a conspiracy to commit abortions had been entered into by May and his nurse, or that Mrs. Zoffel was his nurse. The fact that much of May's testimony may have been false in no way can serve to prove as against Mrs. Zoffel either the fact of the existence of the conspiracy charged, or Mrs. Zoffel's connection therewith.

[3, 4] Also in the apartment at the time of May's arrest were found certain cards which were admitted into evidence over appellant's vigorous protests. These cards were three in number. The first was a Christmas card with the words: "The Zoffels—Rudolph and Frances" printed thereon, and underneath in handwriting the message, "Dalton, I sincerely hope you get a good deal of pleasure of this robe. Rud and Fran, December 25, 1937." Another Christmas card had the name, "Frances Zoffel" printed on it, and in handwriting the message: "Same hope that you get a lot of comfort and pleasure too out of these slippers." The third card was a birthday card which contained the message: "To Cy from Rud and Frances December 28, '38." May explained that these cards came in presents from Brandt. The prosecution did not produce Brandt as a witness, made no attempt to prove that the cards came from appellant, were similar to cards used by her, or that the handwriting thereon was that of appellant. Respondent contends that such cards were admissible as against appellant, and that her failure to take the stand and deny having written them raises some kind of a presumption or inference of guilt. The burden rests on the prosecution and not the defense. Section 13 of article I of the state Constitution, permitting the prosecution to comment on the failure of the defendant to take the stand, cannot be used to supply a failure of proof by the prosecution.

[5-9] In an attempt to supply the necessary foundation for the introduction of these cards as against appellant, the respondent refers to a portion of the record showing an argument between the prosecutor and appellant's attorney over the admissibility of the exhibits, wherein appellant's counsel stated that he did not know whether the exhibits were in Mrs. Zoffel's handwriting, but that would come out in due time; that if they were in her handwriting he would frankly admit it. It is contended by respondent that such remarks were tantamount to an admission that the cards were in appellant's handwriting. This conclusion is obviously unsound. Mrs. Zoffel was not present when the cards were found, was not proved to have ever been in the apartment, and no evidence was offered that they were in her handwriting. As to Mrs. Zoffel, until they were further connected up, the cards were clearly hearsay. Respondent also argues that the cards were admissible under the doctrine of the "footprint" cases, citing

People v. McCurdy, 68 Cal. 576, 10 P. 207, and People v. Dwyer, 24 Cal.App.2d 639, 75 P.2d 653. In both of these cases footprints found near the crime were connected up with the footprints of the accused. Under such circumstances they were clearly admissible. The fallacy of respondent's argument is that here the cards were not connected up with appellant. While it is true that, in a conspiracy case, evidence is admissible that those charged with being coconspirators were intimate, at least where acquaintanceship is denied. (People v. Childs, 127 Cal. 363, 59 P. 768), that rule is not applicable to these exhibits, for the reason that the evidence proving intimacy must conform to established rules of evidence. These cards were improperly introduced as against appellant.

Also in the apartment were found various articles of feminine wearing apparel. No attempt was made to connect this clothing with appellant. The prosecutor in his argument to the jury admitted they had not been connected up to appellant. The other articles and cards found in the apartment were not connected up to appellant and need not be separately mentioned.

[10] There is, however, in the record competent evidence from which the jury could infer that May and Mrs. Zoffel were acquainted. The proprietor of a grocery store, a bartender, and a restaurant man testified that Mrs. Zoffel was seen in the neighborhood of May's apartment on various occasions. The proprietor of the grocery store testified he saw Mrs. Zoffel in his store on several occasions; that she purchased fruit juices, bread and milk. Some cans of fruit juices were found in the apartment. The proprietor of a bar near the apartment testified that both May and appellant visited his bar on occasion; that he could not remember ever seeing May and appellant there together; that Raymond Brandt, Mrs. Zoffel's son, formerly worked in the bar. The proprietor of the restaurant which is located near the apartment testified that appellant visited his place several times as did May; that on two or three occasions May and Mrs. Zoffel sat together; that they did not come in or go out together; that each paid his or her own check; that he never had seen or heard them talking together; that the booths were open, and customers who were unacquainted frequently sat together. This testimony, while material and relevant, does no more than create an inference that May and Mrs. Zoffel were acquainted. It does not of itself prove the existence of a conspiracy between them. It served to rebut May's contention he had never seen or known Mrs. Zoffel, but in this connection it should be mentioned that there is no evidence at all that Mrs. Zoffel ever denied to the police or anyone else that she was acquainted with May.

[11-15] In an attempt to place appellant in the apartment house, the prosecution produced the manager of the apartment house, and her husband, Mr. and Mrs. Nicholson, and Inspector Engler of the homicide detail who had arrested appellant on April 20th. Mrs. Nicholson testified that May first occupied apartment No. 20, and later apartment No. 12; that May had a woman there by the name of Miss Ralston whom he represented to be his sister; that although the defendant resembled that woman, that Miss Ralston was thinner, younger and smaller. She not only failed to identify Mrs. Zoffel as the woman who was in May's apartment, but the respondent concedes that a fair reading of her testimony demonstrates that she testified Mrs. Zoffel and Miss Ralston were not the same person. Mr. Nicholson also failed to identify Mrs. Zoffel as the woman in May's apartment. He testified that he had only seen the woman who represented herself as May's sister on one occasion in a dark hall; that although Mrs. Zoffel resembled the woman he knew as Miss Ralston, she couldn't be the same woman because Mrs. Zoffel is much older; that he couldn't identify Mrs. Zoffel. This testimony apparently was a surprise to the prosecution because the Nicholsons, prior to the trial, had identified appellant as the woman seen around the apartment. Inspector Engler testified that after he had arrested appellant on April 20th he brought her to the apartment; that both Mr. and Mrs. Nicholson had identified her as Miss Ralston and that appellant had immediately denied the accusation. Obviously, the out of court accusation made by the Nicholsons was not evidence of the truth of that accusation. When an out of court accusation is made, it is not the accusation, but the conduct of the accused that is evidence, and the accusation is merely admitted to explain the conduct of the accused. Where the accused denies the accusation, the accusation should not be admitted at all, unless admissible on other grounds. People v. Teshara, 134 Cal. 542,

544, 66 P. 798; People v. Weber, 149 Cal. 325, 338, 86 P. 671. While, under proper circumstances, where the prosecution is both surprised and damaged, testimony that a prosecution witness made out of court inconsistent statements may be admissible for impeachment purposes (secs. 2049 and 2052, Code Civ.Proc.), the evidence so admitted is solely for impeachment, and does not prove the facts contained in the inconsistent statements. 27 Cal.Jur. 169, § 143. This rule applies with particular force to the present case. Aside from the out of court identification of defendant made by the Nicholsons, which they repudiated at the trial, there is no evidence at all placing appellant in the apartment house. There is evidence, already referred to, that she was seen in the general neighborhood, and also evidence from which it might be inferred that May and appellant were acquainted, but there is no evidence at all placing appellant in the apartment where the alleged conspiracy took place.

[16] The only direct evidence connecting appellant with the deceased came from the witness J. L. DuFour. He testified that he was a cab driver for the Bonded Cab Company; that on April 12, 1938, he picked up a fare at Turk and Larkin streets, which is within a half block of May's apartment; that he took the fare to St. Joseph's Hospital; that the call came in at ten minutes to six; that upon arriving at the intersection of Turk and Larkin streets he saw two women; that before he could get out of the cab one of the women was inside and said, "St. Joseph's Hospital", and that the other said, "Well, goodbye and good luck"; that the woman who got into the cab was the deceased Doris Alexander; that appellant herein was the other and older woman. The respondent concedes that such evidence merely tends to prove that appellant was an accessory after the fact. Standing alone it neither proves the conspiracy charged nor appellant's connection therewith.

On cross-examination of DuFour, the defense produced a statement signed by him in which he stated that he was not sure of the identification made by him, and that he could not now identify the appellant. DuFour admitted that he signed the statement, but contended he signed it for a "friend" and did not read all of it. The prosecution then produced as its witnesses the two men who had secured the statement. The first was an employee of appellant's attorney. He testified that after the coroner's inquest he searched for and found the taxi driver; that he told him who he was and engaged him in conversation; that he told DuFour to tell him the truth; that DuFour then told him the facts contained in the written statement; that he took notes of the conversation; that he prepared the written statement from these notes and took it back to DuFour; that DuFour refused to sign it. The second prosecution witness was Frank Woodmansee, a real estate broker who had known DuFour's family as a result of a business transaction. He testified that appellant's attorney had asked him to get the truth from DuFour; that he had approached DuFour; had discussed the matter with him; that he had told him to tell the truth, and to sign the statement if it were true; that after reading it DuFour signed the statement.

It should be here mentioned that appellant produced several alibi witnesses including her mother, a friend from Stockton and a San Francisco friend. The mother testified she had dinner with her daughter and Mrs. Pemberton from Stockton on April 12th, and had been with her daughter and Mrs. Pemberton that afternoon and evening. Mrs. Pemberton testified she came from Stockton to stay with Mr. and Mrs. Zoffel on April 10th; that on April 12th she and Mrs. Zoffel went shopping in the afternoon and that she had dinner with Mrs. Zoffel and her mother that evening; that she was with appellant all that day and night. The San Francisco friend—Mrs. Sadler—testified that on April 12th at twenty minutes or quarter to six she phoned Mrs. Zoffel at her home and had a conversation with her concerning the possibility of Mrs. Zoffel joining a lodge.

It should also be mentioned that Mrs. Luella Johnson was produced as a witness. She testified she had known May for over twenty years; that she had known him in the east; that she also knew Evelyn Fontaine; that she had introduced Evelyn to May at a party on Bush street; that Evelyn and appellant were not the same person. The jury, apparently, as was their province, did not believe these witnesses.

[17, 18] This constitutes a fair summary of the evidence so far as it pertains to the conspiracy charge, and appellant's alleged connection therewith. As will be

seen therefrom, there is no direct or circumstantial evidence connecting appellant with the conspiracy charged. At most, the evidence raises but a suspicion of guilt. After reading the record we are convinced that there is not sufficient direct or circumstantial evidence to support the conviction of appellant. There is sufficient evidence from which the jury could infer that May and Mrs. Zoffel were acquainted, and, conceding that the evidence shows that May conspired with some one to commit abortions, there is no admissible evidence at all from which a reasonable inference could be drawn that Mrs. Zoffel conspired with him for that purpose. The testimony of DuFour tended to connect Mrs. Zoffel with Doris Alexander after the abortion was committed. That evidence standing alone, as already stated, while raising a suspicion, does not prove directly or indirectly the fact of a conspiracy or appellant's participation therein. It is true that appellant may be guilty, but at best the evidence does no more than raise a mere suspicion. It is our opinion, that, tested by every reasonable standard, the evidence is insufficient to sustain the conviction on the conspiracy charge.

For the foregoing reasons the judgment and order denying a new trial are, and each is, reversed, and the cause remanded for a new trial.

We concur: KNIGHT, J.; WARD, J.

WEST KEY NUMBER SYSTEM

35 Cal.App.2d 200

HONEYMAN et ux. v. LAWRIE et al.

Civ. 10973.

District Court of Appeal, First District, Division 2, California.

Oct. 19, 1939.

Rehearing Denied Nov. 18, 1939.

Hearing Denied Dec. 18, 1939.

1. Appeal and error 🔑1066

In action arising out of automobile accident caused by defendant's automobile sideswiping his codefendants' automobile and then striking plaintiffs' automobile, giving of an instruction that Vehicle Code required that vehicles be driven as close as practicable to right-hand edge of roadway, allegedly erroneous because applicable only when two automobiles are traveling in same direction, did not constitute prejudicial error where instruction was applicable to two of the three parties in action and issue of lack of compliance with Vehicle Code provision was not raised by parties. Vehicle Code, §§ 510, 525, 527, St.1935, pp. 176, 181, 182.

2. Trial 🔑260(8)

In action arising out of automobile accident caused by defendant's automobile sideswiping codefendants' automobile and then striking plaintiffs' automobile, failure to instruct that drivers must yield half of highway, and that motor vehicles must be driven upon right half of highway, was not error where instructions covering subject matter of requested instructions were given.

3. Trial 🔑260(8)

In action arising out of automobile accident, failure to instruct on doctrines of law under which no verdict should be rendered against defendants was not error where subject matter of defendants' requested instructions was given in other instructions.

4. Appeal and error 🔑1047(3)

In action arising out of automobile accident, wherein a defendant filed a cross-complaint against codefendants and plaintiffs' failure to strike testimony of defendant's witness as to location of an automobile standing on highway because testimony did not connect codefendant with automobile was not error where defendant subsequently testified that automobile standing on highway belonged to his codefendant.

5. Appeal and error 🔑1004(3)

The denial by lower court of motion for new trial on ground that verdict was excessive must be given due weight and consideration by reviewing court.

6. Damages 🔑130(3)

$1,500 award of damages to husband and wife was not excessive where special damages amounted to $282.36, and husband suffered two fractured ribs although he lost only two days from his work and wife sustained lacerations, suffered from headaches and nervousness and was under doctor's care for 3½ months.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action to recover damages for injuries suffered in an automobile accident by Carl

R. Honeyman and Edith Honeyman against William H. Lawrie, Carmen Lawrie, and Leonard R. Callan. Leonard R. Callan filed a cross-complaint against Mr. and Mrs. Lawrie and Carl R. Honeyman. From judgments in favor of Mr. and Mrs. Honeyman and against cross-defendants, Mr. and Mrs. Lawrie appeal from a judgment against all defendants, and Leonard R. Callan appeals from both judgments.

Affirmed.

J. Hampton Hoge and Hoge, Pelton & Gunther, all of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants and respondents William H. Lawrie and Carmen Lawrie.

Albert Picard and Francis McCarty, both of San Francisco, for appellant and respondent Leonard R. Callan.

Raymond D. Williamson and Arthur J. Healy, both of San Francisco, for respondents Carl R. Honeyman and Edith Honeyman.

STURTEVANT, Justice.

At about 11:30 p. m. on May 27, 1937, on the highway leading from Vallejo to Napa, two automobile collisions occurred. William H. Lawrie was operating an automobile owned by his wife and they were traveling northerly toward Napa. Carl R. Honeyman and his wife were traveling in the same direction approximately 150 feet behind the Lawrie car. Leonard R. Callan was driving in a southerly direction from Napa toward Vallejo. At a point about three and a half miles north of Vallejo there is a slight curve in the highway. As one stands looking north, the highway curves to the left. The roadbed is twenty-five feet wide and has a dirt shoulder on each side two feet wide. A white strip is in place marking the middle line of the road. As the Lawrie car and the Honeyman car drove toward the above-mentioned curve the Callan car traversed the curve and approached the other cars from the north. In passing, the Callan car and the Lawrie car were so operated that they sideswiped each other on the left-hand side. The Callan car proceeded forward and struck the Honeyman car in a head-on collision. The Honeymans sued to recover damages for personal injuries sustained by each of them and for the damages caused to their car. They named as defendants Mr. and Mrs. Lawrie and Leonard R. Callan. The three defendants answered and the defendant Callan filed a cross-complaint. He named as defendants Mr. and Mrs. Lawrie and Carl R. Honeyman. Those defendants answered the cross-complaint and on the issues so framed a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiffs Mr. and Mrs. Honeyman and it returned another verdict in favor of the cross-defendants named in the cross-complaint. Mr. and Mrs. Lawrie appealed from the judgment against all of the defendants. Leonard R. Callan appealed from both judgments. We will first discuss the appeal taken by Mr. and Mrs. Lawrie.

The first point made by these defendants is that the trial court erred in giving to the jury a certain instruction. That instruction was as follows:

"Any violation of the terms of the motor vehicle code of the state of California to be read to you, is presumptively an act of negligence, and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances. The Vehicle Code of the state of California, so far as here pertinent, provides as follows:

" 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.

* * * * * *

" 'Upon all roadways of sufficient width a vehicle shall be driven upon the right half of (and as close as practicable to the right-hand curb or edge) of, such roadway.

* * * * * *

" 'Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and, except when a roadway has been divided into traffic lanes, each driver shall give to the other at least one-half of the main traveled portion of the roadway whenever possible.' St.1935, pp. 176, 181, 182, §§ 510, 525, 527.

[1] "That ends the Vehicle Code section." (Parentheses ours.) The defendants complain of the presence of the words we have enclosed in parentheses. They contend that the expression complained of is applicable only when two automobiles are traveling in the same direction. Arundel v. Turk, 6 Cal.App.2d 162, 44 P.2d 383; Polk v. Weinstein, 12 Cal.App.2d 360, 55 P.2d 588: We think there is no merit in the complaint. The court was giving instruc-

tions in a case in which three different operators of three different automobiles were involved. The Lawrie car and the Honeyman car were going in the same direction. At least as to them the instruction was clearly applicable. In the second place these defendants have not quoted anything contained in the record which shows or tends to show that the instruction was prejudicial to them. In our examination we have not found anything indicating that the instruction, as given, was prejudicial to any one of the parties. After the jury had been selected an opening statement was made by the attorney for each of the parties. Later every eye-witness was called and examined. At no time was any contention made that any one of the three cars was or was not driven as close as practicable to its right-hand curb or edge of the highway. On the other hand, throughout the trial the plaintiffs and the defendant Callan contended that the car of the defendant W. H. Lawrie, down to the time of the collision between his car and Callan's car, was being zigzagged across the white line and that the collision occurred on the western side of the white line. The defendant Lawrie contended that Callan approached from the north at a high rate of speed, zigzagging across the white line, and collided with Lawrie's car on the eastern side of the white line. In the entire record we do not find that any other contentions were made by the respective parties. It is clear, therefore, that this court may not say the insertion of the language complained of in the instruction above set forth was prejudicial error. Bosqui v. Sutro R. Co., 131 Cal. 390, 401, 63 P. 682; Cook v. Los Angeles Ry. Corporation, 169 Cal. 113, 115, 145 P. 1013.

[2] Closely allied to the point just discussed these defendants complain because the trial court refused to give several of their proposed instructions. They say the court erred in refusing to instruct that each driver was required to yield one-half of the highway, that each vehicle should have been driven upon its right half of the roadway, and that each driver was required to yield one-half of the main traveled portion of the roadway. The vice in these contentions is that an inspection of the instructions shows the court clearly covered the identical matters which these defendants say were omitted. In that connection the instruction which immediately followed the one above set forth was as follows: "The operator of an automobile is not necessarily exempt from liability for injuries occurring in a public street by showing simply that at the time of the accident he was running his automobile at a rate of speed and in a manner allowed by law. He still remains bound to anticipate that he may meet persons at any point on the street, and he must, in order to avoid a charge of negligence, keep a reasonably prudent look-out for them and keep his machine under such control as will enable him to avoid collisions with other persons using ordinary care and caution, and if the situation requires, he may be compelled in the exercise of ordinary care to slow up or even to stop."

[3] In this same connection these defendants complain because the court refused to instruct on doctrines of law under which no verdict should be rendered against them. They quote several requests. Each was a concrete application of the law to the claims made by these defendants. However, an examination discloses that the trial court gave instructions which fully covered every claim made by these defendants.

The last point made by these defendants is that the verdict was excessive. The same contention is made by the defendant Callan. The point will be discussed below.

The defendant Callan claims the trial court erred in giving the first instruction which we have set forth above. His contention is based on the same grounds and he relies on the same authorities as the other defendants. For the reasons hereinabove set forth we find no merit in his contention.

[4] It was the theory of the defendants Lawrie that Callan approached from the north at a high and excessive rate of speed, that he zigzagged over the white line and as he was passing their vehicle he crossed the white line, sideswiped their car, proceeded forward and collided with the Honeyman car, and then continued forward and collided with the approach to a culvert. The defendants Lawrie called as a witness Sergeant Cecil Shrum. That witness testified that immediately prior to the accident he was riding with Sergeant Swallow in an automobile and was going toward Vallejo. While on the highway at a point north of the place where the accident occurred a car passed Sergeant Swallow and himself, traveling forty-five to fifty miles an hour. They proceeded on

their way and presently they came to a Ford car on the west side of the highway standing up against the culvert. The defendant Callan moved to strike out the testimony of the witness on the ground that his evidence did not connect the defendant Callan with the car that stood up against the culvert. Counsel for the defendants Lawrie promised to connect the testimony. The court stated it would not rule on the motion to strike until later. At this time the defendant Callan claims the ruling was erroneous. We cannot sustain that claim. At a subsequent hearing the defendant Lawrie testified the car standing up against the culvert was the car driven by the defendant Callan and the car that was involved in the collisions hereinabove described. Under these facts we cannot say the testimony was not connected.

[5, 6] As stated above the defendants Lawrie and the defendant Callan contend the verdict was excessive. The same contention was made in the trial court when they presented a motion for a new trial. That court denied the motion and its ruling on the motion must be given due weight and consideration in this court. James v. Oakland Traction Co., 10 Cal. App. 785, 799, 103 P. 1082. The amount of the verdict returned by the jury was $1,500. Special damages proved by the plaintiffs, including doctor bills and repairs to the automobile of the plaintiffs, amounted to $282.36. It follows that the sum of $1,217.64 was allowed as general damages for personal injuries suffered by Mr. Honeyman and Mrs. Honeyman. Mr. Honeyman contended that two of his ribs were fractured and that he suffered a marked tenderness and pain. His physician strapped him with adhesive tape. The tape remained in place three or four weeks. The doctor took X-rays which he produced at the trial. On cross-examination he testified that from an examination of the X-rays he could not state whether there was a fracture or not. He also testified that one cannot always demonstrate by looking at an X-ray whether a rib is fractured or is not fractured. In another place the doctor testified that the ribs were fractured. That evidence was not contradicted by any other testimony. Two days after the accident Mr. Honeyman resumed his labors as a bartender, and so far as the record discloses he did not lose any other time. Mrs. Honeyman sustained lacerations. There was a two-inch cut over her eye on the forehead. Three stitches were necessary to close the wound. It left a scar one inch long. The muscles in her neck and left shoulder were pulled and strained. She suffered a contusion in the region of the right temple and of the lower chest. She also suffered lacerations and contusions of both knees. She was under the care of Dr. Baker about three and a half months. She suffered headaches for almost a year afterwards and nervousness which continued down to the time of the trial. Answering the contention made by the defendants that the verdict was excessive, we think it must be conceded the verdict was liberal but that a court may not say, as a matter of law, that it was so excessive as to indicate it was the result of passion or prejudice.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

---

35 Cal.App.2d 231

PEOPLE v. SANCHEZ et al.

Cr. 3264.

District Court of Appeal, Second District, Division 2, California.

Oct. 20, 1939.

1. Burglary 🔑41(1)

It is not necessary that eyewitnesses to a burglary testify in order to warrant a conviction, but burglary may be proven by circumstances.

2. Burglary 🔑45

After proof of burglarious entry, sufficiency of incriminating circumstances is question which belongs exclusively to the jury.

3. Criminal law 🔑407(2), 741(3)

An accusation of crime calls for a reply even from a person in custody of an officer, and weight of statements of person accused of crime or of his silence is matter for jury.

4. Criminal law 🔑342

Where identity of person who commits a crime is admitted to be proven by circumstantial evidence, evidence of motive is always a subject of proof, and the fact of motive particularly material.

5. Burglary 🔑42(3)

Possession of stolen property, together with other evidence, including defendant's flight, his silence after apprehension and nature of articles taken, justified conviction of burglary.

6. Burglary 🔑41(7)

In burglary prosecution, where stolen property consisted of women's undergarments, positive recognition by the victims of the stolen property was sufficient to sustain conviction.

7. Larceny 🔑65

Proof that total value of all articles allegedly stolen by defendant from three places taken together had value of less than $20 justified conviction of petty theft. Pen.Code, §§ 666, 667.

8. Criminal law 🔑351(3), 552(1), 782(5)

That defendant's flight was from presence of threatening police and not from premises which he was charged with looting did not diminish its efficacy as evidence or reduce its weight as proof, and hence an instruction on flight was properly given. Pen.Code, § 1127c.

9. Criminal law 🔑759(5), 808½

Where evidence requires an instruction on flight, an instruction in language of statute is only one permitted, and such instruction does not invade jury's province. Pen. Code, § 1127c.

10. Criminal law 🔑1144(15)

It must be presumed on appeal from conviction of a criminal offense that jury followed the law as presented by trial court's instructions.

11. Criminal law 🔑732
Jury 🔑34(1)

The statute prescribing language for an instruction on flight, which properly presents the law in that it forbids jury to convict upon flight alone, and allows flight to be considered, but requires it to be proved and leaves its weight to determination of jury, is not unconstitutional. Pen.Code, § 1127c; Const. art. 6, § 19.

12. Indictment and Information 🔑87(2), 176

It is not necessary to allege or prove exact date upon which an offense was committed except in cases where date is material.

13. Criminal law 🔑565

Defendant's contention that failure to prove exact times of crimes charged deprived him of his alibi was without merit, where evidence clearly fixed time of alleged burglaries and of petty theft within such narrow compass that an alibi could have been readily established if one had been available.

◆

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Robert C. Sanchez, also known as Bob Sanchez and Casimero Sanchez was convicted upon two counts of burglary and eight counts of petty theft after prior convictions, and Casimero Sanchez alone appeals.

Affirmed.

W. P. Butcher, Jr., of Santa Barbara, for appellant.

Earl Warren, Atty. Gen., Burdette J. Daniels, Deputy Atty. Gen., and Percy C. Heckendorf, Dist. Atty., and Lawrence M. Parma, Deputy Dist. Atty., both of Santa Barbara, for the People.

MOORE, Presiding Justice.

Defendant appeals from a judgment of conviction upon two counts of burglary and eight counts of petty theft after prior convictions (secs. 666, 667, Pen.Code) and from an order denying his motion for a new trial.

He bases his appeal upon the following grounds, namely: (I) that the evidence is insufficient to establish any crime by defendant; (II) that the statutory instruction on flight was improper; (III) that said statute is unconstitutional; and (IV) that failure to prove the exact times of the crimes deprived him of his alibi.

The apartments burglarized were those of the McDuffie family and the apartment occupied by Misses Schmidt, Redford and Johnston; while the acts of petty theft without entry were the taking of certain articles from the premises of one Mrs. Kohrs. All of the victims resided in the city of Santa Barbara.

I. The evidence proves both burglaries and thefts as well as the identity of the defendant as the transgressor. On the 24th of December, 1938, at noon, the McDuffies left their home and returned at

9 p. m. on the night of the 26th. At the time of leaving Mrs. McDuffie left in her bedroom chest a nightgown and a girdle. She locked her doors securely, drew down the shades, left a bathroom window open with threads stretched across the aperture. No permission was given to enter their home or to take any of their belongings. On their return, they found the blinds were up, said threads broken, the chest of drawers open, and her said apparel gone.

During the absence of the McDuffies, Mr. and Mrs. Groom and Mrs. Sherrill, residents of the same court, on observing the back door ajar, entered the McDuffie apartment on December 25th at 11 a. m., found the conditions above described, windows and screens partly open and the bathroom window up. These facts timed the burglarious entry between noon of December 24, 1938, and 11 a. m. on December 25th.

With reference to the Schmidt burglary, the three ladies occupied the apartment; no one had keys but themselves. Miss Schmidt owned a brassiere-panties set which she left under her Christmas tree Monday, December 26th, at 3:45 p. m., to absent herself until 11 p. m. No one was given authority to enter the apartment or to take the movables of any one of them. Upon her return, she found her co-occupants and four friends present. No one of these had taken anything. But Miss Schmidt discovered her brassiere and panties missing and Miss Redford's stockings gone.

As to the Kohrs' theft on November 28, 1938, she had laundered her miscellaneous underwear and lingerie and hung it outside on the clothes line. No one had permission to remove the articles but, on the following morning, her brassiere-panties combination and hose had been taken. No wind had blown with sufficient force to remove them during the intervening night.

On December 31, 1938, as defendant emerged from his apartment with two bundles under his arm and a black bag in his hand, he observed Police Officer Riggs approaching him. He immediately dropped his burden, ran, with the officer in pursuit, and disappeared. Later apprehended, he was by the officers confronted with said stolen articles just removed from said abandoned packages and bag. No protest was uttered or made by him; he had fled at the approach of the officer; he was now silent in the face of accusation. He had suffered former convictions for burglary and for the stealing of similar articles of ladies' apparel. Said two burglaries had occurred within a week prior to his arrest and the petty thefts all occurred within less than one month. At the McDuffie and Schmidt premises, he left articles of value untouched, taking only the undergarments of women.

[1, 2] (1) The evidence is ample to prove the crime. It is not necessary that eye-witnesses to a burglary testify in order to warrant a conviction. Burglary is practically always committed in the absence of the occupants or while they sleep. It must, in such cases, be proved by circumstances. After proof of entry, the sufficiency of the incriminating circumstances is a question which belongs exclusively to the jury. People v. Willison, 116 Cal.App. 157, 2 P.2d 543; People v. Rodway, 77 Cal.App. 738, 247 P. 532. Evidence detailing the above summary was received and it is sufficient.

[3] (2) The evidence amply proves the prisoner was the thief. An accusation of crime calls for a reply even from a person in the custody of an officer. 8 Cal.Jur. 103. The weight of such statements or of silence is a matter for the jury. Id. Such behavior has many times been accepted as tending to prove the guilt of the party (People v. McCoy, 127 Cal.App. 195 at page 200, 15 P.2d 543; People v. Shelest, 62 Cal.App. 213, 216 P. 389; People v. Schoon, 177 Cal. 678, 171 P. 680) and this is true even though the defendant stands mute upon advice of counsel. People v. Graney, 48 Cal.App. 773, 192 P. 460. The disposition of a guilty conscience to shield itself by flight from lawful authority is so universally recognized that a man of ordinary understanding will infer probable guilt upon mere proof of silence when accused. His abandonment of the stolen goods to commence his flight, his unexplained possession, his scheme and his motive—all justify the jury's finding of his guilt. People v. Morris, 124 Cal.App. 402, 12 P.2d 679; People v. Golembiewski, 25 Cal.App.2d 115, 76 P.2d 717.

[4, 5] (3) Also, the finding of burglarious intent as well as of defendant's identity as the burglar are fully justified. The robberies of both apartments and the capture of defendant with the stolen goods within a week, with no explanation "upon a theory inconsistent with his guilt" are facts which, when believed, warrant the

conviction of burglary. People v. Morris, supra; People v. Golembiewski, supra. His selections of the undergarments of women from three separate localities and leaving in the burglarized home things of value, taken with his prior convictions of stealing similar articles, indicate a sexually perverted nature and marked him definitely to the jury as the offender. People v. Randolph, 133 Cal.App. 192, 23 P.2d 777; People v. Willis, 70 Cal.App. 465, 233 P. 812; People v. Kelley, 208 Cal. 387, 281 P. 609. "Where the identity of a person who commits a crime is admitted to be proven by circumstantial evidence, such as the case at bar, evidence of a motive * * * is always a subject of proof, and the fact of motive particularly material." People v. Argentos, 156 Cal. 720, at page 726, 106 P. 65, at page 67.

It is true that possession of stolen goods might be reconciled with innocence of a burglarious entry, but in view of his three thefts in thirty days, his possession, his flight, his silence after apprehension, and of the nature of the articles, no doubt remains of defendant's guilt. At least it was a logical deduction for the jury from the facts proved. People v. Willison, supra; People v. Brandon, 134 Cal.App. 550, 25 P.2d 485; People v. Cascino, 137 Cal.App. 73, 29 P.2d 895; People v. Getzoff, 139 Cal.App. 721, 34 P.2d 773; People v. Brown, 139 Cal.App. 7, 33 P.2d 843.

The cited case of People v. Barry, 94 Cal. 481, 29 P. 1026, is not in point. Barry had entered a public store in broad daylight, during business hours. A proffered instruction that a person's attempt to steal while in a building is not sufficient to cast upon him the burden of proving his innocence of burglarious intent, was erroneously denied. Nothing there can be assimilated to the facts here where the jury has convicted the defendant on the facts above summarized. Clandestinely and in the nighttime, all occupants absent, he had entered homes and secret places, taken garments and kept them to the day of his apprehension.

[6] (4) Defendant's contention that the stolen articles were not specifically identified vanishes in the presence of proof. The witnesses, in their turn, identified them by the color of the material, by torn and mended places, by matching them with other articles at home, by the quality of the lace, the size of the article, the combination of brassiere and panties, and worn elastic. The positive recognition by the victims of the stolen property was sufficient. People v. Frahm, 107 Cal.App. 253, 290 P. 678; People v. Kuhl, 28 Cal.App.2d 471, 82 P.2d 715.

[7] (5) Surely the contention that petty theft is not shown needs only the suggestion that the total value of all articles stolen from the three places taken together had a value of less than $20.

[8-10] II. The court read to the jury the instruction in section 1127c, Penal Code, as follows: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine."

The argument is made that this instruction was error on the ground that it does not take into consideration other circumstances in connection with the alleged crime or the question as to whether or not his flight was explained, and invades the province of the jury.

Since there was ample evidence to warrant a flight instruction, the court was required to give it. Moreover, the fact that his flight was from the presence of the threatening police and not from the looted premises does not diminish its efficacy as evidence or reduce its weight as proof. The world was unconscious of his presence as he executed his crime. He had no fears of detection then. Refuge was his need only when his safety was threatened. Knowing a crime had been committed, "no other inference can be reasonably drawn from the evidence but that he knew he would be charged". People v. Erno, 195 Cal. 272, 232 P. 710, 714. The presence of the minions of the law calling upon an evildoer to stop is as potent as any formal accusation inscribed upon parchment. Immediate flight in the absence of any formal accusation may afford persuasive evidence of a consciousness of guilt. People v. Campos, 10 Cal.App.2d 310, 52 P.2d 251. Therefore, since an instruction was required, the language of 1127c of the Penal Code was "the only instruction permitted by the section". People v. Madison, 3 Cal.2d 668, 46 P.2d 159, 162. Neither does it invade the jury's province. People v. Hansen, 130 Cal.App. 217, 19 P.2d 993; People v. Campos, supra. It left all questions of fact solely for the jury (People v. Blake, 129 Cal.App. 196, 18 P.2d 399) and did not assume the guilt or flight of the accused. It must be presumed that the jury followed the law as presented and, therefore, if flight was not proved, it was not considered in reaching a verdict. Otherwise the appellate courts would be constantly burdened with the duty of weighing the evidence and reaching a determination upon the facts which the law has peculiarly vested in the juries and in the trial courts. Furthermore, if it had been erroneous, it caused no prejudice. People v. Lee Nam Chin, 166 Cal. 570 at page 573, 137 P. 917; People v. Erno, supra.

[11] III. The contention that said section is invalid is not upheld. In the absence of constitutional restraints, the legislature speaks with the voice of sovereignty. No language of the fundamental law is cited and none is known to inhibit a statute reasonably prescribing language for an instruction. The guarantees of the right of trial by jury were never construed to mean that the courts are not to govern the conduct of trials or that the legislature is not allowed to enact substantive law or that it cannot frame the language with which to clothe the law for its presentation to a jury. The challenged instruction "states the law." (Const. art. VI, sec. 19), forbids the jury to convict upon flight alone, and allows flight to be considered; but requires it to be proved and leaves its weight to the determination of the jury. As an instruction, it has been many times approved. People v. Campos, supra; People v. Hansen, supra; People v. Ross, 115 Cal. 233, 46 P. 1059.

[12, 13] IV. Finally, the evidence clearly fixed the time of the burglaries within such narrow compass that an alibi could have been readily established if one had been available. It is not necessary "to allege or prove the exact date" upon which an offense was committed except in cases where the date is material. People v. Jones, 76 Cal.App. 144, 244 P. 101; People v. Ephraim, 77 Cal.App. 29 at page 37, 245 P. 769. Defendant made no effort to prove his whereabouts during the interim between the departure and return of the McDuffies or the Schmidt, Redford-Johnston trio, nor did he disclose his whereabouts on the night of November 27th when the Kohrs' clothes line was robbed.

The judgment and order are affirmed.

We concur: WOOD, J.; McCOMB, J.

---

35 Cal.App.2d 248

CHARLES LOMORI & SON v. GLOBE LABORATORIES.

Civ. 6194.

District Court of Appeal, Third District, California.

Oct. 23, 1939.

1. Appeal and error 🔑854(6)

When motion for new trial on several statutory grounds is granted on specified ground of insufficiency of evidence to support jury's verdict and judgment thereon, Appellate Court is not confined to grounds stated by trial court, but may uphold order on any other ground included in motion.

2. New trial 🔑71

In action for breach of warranty of hog cholera serum, and death of hogs from cholera, trial court did not abuse its discretion in granting defendant a new trial after verdict and judgment for plaintiff, in view of expert witnesses' conflicting testimony as to cause of hogs' deaths.

3. Appeal and error 🔑1015(3)

Witnesses' credibility, weight of evidence and sufficiency thereof to establish damages resulting from breach of warranty of hog cholera vaccine were for trial judge to determine on motion for new trial after verdict and judgment for plaintiff in action for such damages.

4. Appeal and error 🔑977(3)
New trial 🔑6

The granting of motion for new trial is within trial judge's sound discretion, which will not be disturbed on appeal, in absence of showing of clear abuse thereof.

5. Sales ⚷280

Assurance in advertising circular of positive prevention of hog cholera by simultaneous use of advertised serum and virus was conditional on administration of proper quantities of serum prescribed by table of doses in circular and depended on condition of animals vaccinated, premises on which kept and performance of vaccination in manner prescribed therein, and hence was not absolute warranty binding on manufacturer and seller of such serum and virus.

6. Sales ⚷280

In action to recover damages for deaths of hogs because of ineffectiveness of cholera serum purchased by plaintiff from defendant corporation, provisions of printed labels on bottles of serum that since defendant had no control over diagnosis, method of administration or handling of serum, it waived all responsibility following use thereof, should be construed as disclaimer of, or at least limitation on, defendant's liability for breach of alleged warranty of serum.

7. Sales ⚷260

Ordinarily, it is too late to disclaim warranty after consummation of sale of goods warranted.

8. Sales ⚷280

One purchasing serum in reliance on promise in advertising circular that serum would absolutely render hogs immune from cholera may rescind purchase and recover price paid after loss of hogs because of serum's impotency, but may not justly disregard warning of labels on bottles thereof that seller renounced or disclaimed responsibility for use of serum under specified circumstances, use it in spite of such limitation, and recover damages for such loss solely on ground of breach of warranty.

9. Appeal and error ⚷867(2)

Defendant's liability for damages because of negligence in compounding or selling deteriorated hog cholera serum will not be considered on plaintiff's appeal from order granting defendant new trial after verdict and judgment for plaintiff in action for breach of warranty of serum, where no appeal was taken from order granting nonsuit on count of complaint alleging such negligence.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Charles Lomori & Son, a copartnership, against the Globe Laboratories, a corporation, to recover damages for breach of warranty of hog cholera vaccine and deaths of hogs from cholera. Judgment for plaintiff, and from an order granting defendant a new trial, plaintiff appeals.

Affirmed.

Heim Goldman, Richard M. Lyman, Jr., and Harold A. Block, all of San Francisco, for appellant.

Dockweiler & Dockweiler, of Los Angeles, for respondent.

THOMPSON, Acting Presiding Justice, delivered the opinion of the court.

The plaintiff recovered judgment for $4,500, pursuant to the verdict of a jury, for damages for alleged breach of warranty, resulting in the loss of 466 hogs from cholera. A new trial was granted on the specified ground of the insufficiency of the evidence to support the verdict and judgment. From that order the plaintiff has appealed.

The complaint is couched in two counts. The first cause of action is based on an alleged breach of warranty printed in an advertising circular, accompanying the purchase of cholera virus and serum in which the plaintiff asserts the defendant guaranteed the vaccine would absolutely render hogs immune from cholera. The second count sought to recover damages for the loss of 466 hogs alleged to have died from cholera, on the ground of defendant's negligence in compounding and preparing hog cholera virus and serum which were purchased and used by the plaintiff. The cause was tried with a jury. When the plaintiff's evidence was closed, upon motion for a nonsuit, by consent of the plaintiff it was granted as to the second count and denied as to the first cause of action. A verdict of $4,500 was returned on the first count in favor of the plaintiff. Judgment was rendered accordingly. A motion for new trial was presented on several grounds. It was granted on the specified ground of the insufficiency of the evidence to support the verdict and judgment.

[1] When a motion for new trial is made on several statutory grounds, and it is granted on the specified ground of insufficiency of the evidence, the appellate court is not confined to the ground stated

by the trial court, but may uphold the order on any other ground included in the motion for new trial. Smith v. Royer, 181 Cal. 165, 183 P. 660; Reilley v. McIntire, 29 Cal.App.2d 559, 85 P.2d 169; 2 Cal. Jur. 816, § 478. The respondent does not stress any errors at the trial, as authority for granting a new trial, other than that of the insufficiency of the evidence, and we shall therefore confine our attention to that feature of the appeal alone.

[2,3] The evidence shows that the plaintiff maintained a hog ranch in South San Francisco, where it owned 2000 pigs. In the fall of 1935 some of its hogs exhibited symptoms of an ailment. The ranch was visited by a salesman representing the Globe Laboratories, engaged in the preparation, compounding and sale of medicines, viruses and serums for vaccinating and treating diseased animals. The laboratory maintained places of business in several states, including California. Its California headquarters were at Stockton. The ailment with which the plaintiff's pigs were afflicted in the fall of 1935 was not at first diagnosed as hog cholera, but medicine was prescribed to be mixed with the food supplied to the animals. Out of precaution, the agent successfully vaccinated fifteen hogs in October, 1935, with two remedies administered simultaneously, to wit: anti-hog cholera serum and hog cholera virus, which were prepared and sold by the defendant under a license in accordance with rules adopted by the bureau of animal industry of the department of agriculture of the United States.

The defendant supplied the plaintiff with a six-page pamphlet entitled "Hog Cholera; Prevention and Control". The document characterized hog cholera as a "highly infectious disease". It described the symptoms and progress of the disease. It suggested the method of diagnosis. It warned owners of hogs against unsanitary conditions and poor food. It recommended as a means of preventing the disease the simultaneous use of anti-hog cholera serum and hog cholera virus, prescribing the doses of each medicine to be administered according to specified ages of the hogs and gave directions for surrounding conditions and for the method of vaccination of the animals. Among other statements included in the pamphlet were the following:

" 'Anti-hog cholera serum, prepared according to the methods originally worked out by the Bureau of Animal Industry, is the only agent known that can be regarded as a reliable preventive.' U. S. Department of Agriculture, Farmer's Bulletin No. 834, page 26.

* * * * * *

"Prevention. Hog Cholera can positively be prevented *in all susceptible animals* by the simultaneous method of vaccination with Anti-Hog Cholera Serum and Hog Cholera Virus. Vaccinated animals produce a fast and active immunity lasting for the life of the animal. Vaccination with serum and virus is positively the only way to prevent and control Hog Cholera.

* * * * * *

"The use of serum alone will confer an immediate but temporary immunity which cannot be depended upon to protect the animal for more than 20 to 25 days."

Each bottle of serum sold by the defendant contained a label upon which the following language was printed:

"This bottle contains serum which has been produced in accordance with rules and regulations required by the Bureau of Animal Industry and has passed rigid pig test for potency and purity under government supervision. *Therefore, since we have no control over diagnosis, method of administration, or handling of this serum after it leaves our possession, we waive all responsibility following its use.*"

The respondent contends the italicized portion of the preceding paragraph constitutes an express disclaimer of warranty as to the result of the use of the vaccines. There was evidence of another similar alleged warranty in a later circular issued by the defendant. But it appears that document was not printed by the defendant until the fall of 1936, after the purchase and use of the vaccine by the plaintiff. That statement, therefore, could not have been relied upon by the plaintiff in his use of the compounds, and we shall not consider it on this appeal.

From a careful reading of the entire record in this case we are unable to say that the trial court abused its discretion in granting a new trial, and the order should therefore be affirmed. The alleged warranty is conditional. It should be construed with the prescribed care of hogs. doses of medicine and manner of vaccination of animals recommended in the pamphlet. The pamphlet which contains the alleged warranty includes a table of prescribed doses of anti-cholera serum which must be administered so as to effectually prevent cholera. It states that "the very least amount that should be used under any condition" is 28 cubic centimeters of serum for hogs weighing from 40 to 90 pounds, and for hogs weighing over 180 pounds it requires 60 cubic centimeters. It prescribes for animals weighing over 250 pounds the addition of 2 cubic centimeters for each ten pounds. The undisputed evidence is that the plaintiff failed to use the minimum amount of serum prescribed in vaccinating its hogs. The plaintiff testified that it vaccinated from 800 to 1000 hogs; that some of them weighed 280 pounds, and that the average weight was over 70 pounds. The evidence shows that plaintiff bought a total amount of serum aggregating 23,250 cubic centimeters and that some of this was not used, but was destroyed. It does not appear what amount of serum was used in vaccinating hogs weighing from 40 to 280 pounds. If 1000 hogs were vaccinated, the plaintiff failed to use the minimum amount of serum prescribed. The table of doses declares that "It is expected that larger doses will be used in the field *under average field conditions.*" The plaintiff testified that it had 2000 hogs. It appears that a band of 150 hogs was shipped from Wisconsin during the drought season and added to its herd in the summer of 1936 when the epidemic occurred. The plaintiff testified that 466 of its hogs died within about five months from May to September, 1936. But we are directed to no evidence that it was only the vaccinated hogs that died. In the absence of such evidence we must presume that many of the hogs which died were not vaccinated. Moreover, the plaintiff testified that it vaccinated from 100 to 125 hogs each month. With the exception of a small bottle of serum purchased in the fall of 1935, all of the serum purchased from the defendant was procured from the middle of April to the middle of September, 1936. If we assume his operations of vaccination continued for five months at the estimate of 125 hogs per month, it would have treated only 625 animals. There is a wide discrepancy between that number and plaintiff's asserted estimate of 800 or 1000 hogs which he declared that he vaccinated. The surrounding sanitary conditions and the care and successful vaccination of hogs are made important elements by the terms of the circular for procuring effective treatment. The evidence is contradictory regarding such conditions. One veterinarian testified that he visited the plaintiff's premises in October, 1936, and found unsanitary conditions prevailed there. While the plaintiff usually employed an expert veterinarian to treat its hogs, it appears that the plaintiff vaccinated the hogs in 1936 without the aid of an expert. The expert witnesses agreed that while a nonexpert might successfully vaccinate hogs, it was important to have the assistance of a veterinarian for that purpose, especially when large numbers of a band were being treated. Dr. Herring, plaintiff's chief expert witness, said "that virus should be used by veterinarians". Four expert witnesses were elaborately examined as to the cause of the death of the hogs. Their evidence is absolutely conflicting on that subject. The disease ot hog cholera is determined on post mortem examination, chiefly by the presence of little red spots called "pici blood spots", found in the bladder and intestines and on the liver and kidneys, together with other accompanying symptoms. Dr. Herring examined only one hog which died at plaintiff's ranch. He positively asserted that the disease from which that pig died was "pure hog cholera". On the contrary, Dr. O. A. Diller, of Stockton, made a post mortem examination of two hogs October 12, 1936, and testified that he found "no evidence of hog cholera". He said he found evidence that the hogs died of bronchial pneumonia. He also said he visited the plaintiff's hog ranch on October 10th and found the pens were "dark, wet and cold", and in an unsanitary condition with decomposed garbage scattered about.

Under such conflicting evidence regarding the cause of the death of the hogs, we may not say the trial court abused its discretion in granting a new trial. The credibility of witnesses, the weight and sufficiency of the evidence to establish a satisfactory case of damages resulting from a breach of warranty, were for the determination of the trial judge upon that motion.

[4] It has been uniformly held that the granting of a motion for a new trial is within the sound discretion of the trial judge, and that it will not be disturbed on appeal in the absence of a showing of clear abuse of discretion. Malloway v. Hughes, 125 Cal.App. 573, 13 P.2d 1062; City of San Diego v. Cuyamaca Water Co.,

209 Cal. 152, 167, 287 P. 496; Hanlon Drydock & Shipbuilding Co. v. Southern Pac. Co., 92 Cal.App. 230, 268 P. 385; Petroff v. Nunes, 123 Cal.App. 614, 11 P.2d 648; Boness v. Helphinstine, 132 Cal.App. 677, 23 P.2d 420; 20 Cal.Jur. 27, sec. 13; 2 Cal.Jur. 905, § 533.

[5] We are urged by the appellant to determine whether the language in the hog cholera circular constitutes a warranty which is binding upon the defendant and whether the language of the labels attached to each bottle of serum become disclaimers which relieve the defendant from the inference that the simultaneous use of its serum and virus under all circumstances will positively prevent cholera. Upon the record in this case, these are questions which we believe are unnecessary to the determination of this appeal pursuant to section 53 of the Code of Civil Procedure. However, we have no hesitancy in saying that the above-quoted assurance of a positive prevention of hog cholera by the simultaneous use of defendant's serum and virus, as stated in the circular, is conditional upon the administration of the proper quantity of serum prescribed by the table of doses therein contained, and dependent on the condition of the premises, the condition of the animals vaccinated, and the performance of the operation of vaccination in the manner prescribed. Clearly such minimum doses prescribed and such sanitary conditions and method of vaccination are an inseparable part of the warranty. Common sense teaches us that the prevention of cholera, like smallpox or any other virulent disease, depends on sanitary surroundings, the condition of the subject and many other circumstances. The efficiency of antidotes necessarily depends on attending circumstances and conditions. The hog-cholera circular clearly informs the reader of that fact. All expert witnesses agreed that the potency and effectiveness of vaccination of hogs depend on the administering of an adequate quantity of the serum. The evidence shows that five to ten per cent of all hogs die under normal conditions in spite of approved methods of care and treatment.

[6] Moreover, in a suit for damages resulting in the death of hogs due to a lack of effectiveness or potency of the serum and virus, as distinguished from a suit to rescind a contract to buy merchandise or to recover the price paid for defective compounds, we are of the opinion the italicized portion of the above-quoted language on the labels of all bottles of medicine should be construed to be a disclaimer under the circumstances enumerated, or at least a limitation on the liability of the defendant for the alleged warranty. The plaintiff admitted that these labels were read. Certainly the language that since the defendant had "no control over diagnosis, method of administration, or handling of this serum after it leaves our possession, *we waive all responsibility following its use*", is clear notice that in the absence of such control, the absolute prevention of hog cholera is not guaranteed under all circumstances and conditions from the mere use of the serum and virus.

[7-9] Reputable authorities are cited, and it is undoubtedly the ordinary rule that it is too late to make a disclaimer of a warranty after a sale has been consummated. In the present case, however, it appears each bottle contained the same statement of limitation of guaranty. Even though the last-mentioned rule applied to the first small purchase of serum in October, 1935, the plaintiff would be bound to take notice that subsequent purchases would be likely to be made subject to that same restriction. Most of the serum purchased by the plaintiff was therefore procured with the knowledge or expectation of that disclaimer. It is reasonable to conclude that when one seeks to recover damages for the loss of pigs on account of the impotency of medicine administered, when the label on each bottle is read and understood, specifically warning the user thereof that the seller renounces and disclaims all responsibility for its use under specified circumstances, relying on the promise of the circular he may rescind the purchase and recover the price paid for the medicine, but he may not justly disregard the warning of the labels, use the serum in spite of that limitation and recover damages for the loss of the hogs, based solely on a suit for breach of warranty. Of course, a suit for negligence in compounding the medicines or for selling deteriorated serum and virus might, nevertheless, lie. But the cause of action based on such negligence was dismissed. The order granting a nonsuit on that count of the complaint was granted. No appeal was taken from that order, and it became final. That theory of liability is separate and

distinct from this suit based on an alleged breach of warranty, and is not here involved.

The order is affirmed.

We concur: DEIRUP, J., pro tem.; TUTTLE, J.

BROWNE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 11162.

District Court of Appeal, First District, Division 1, California.

Oct. 19, 1939.

Hearing Granted Dec. 18, 1939.

1. Courts 🔑475(1)

Where two tribunals have concurrent jurisdiction over the same parties and subject matter, the tribunal in which jurisdiction first attaches retains it exclusively, and the other court, if of co-ordinate jurisdiction only, cannot in any form review, reverse, nullify, restrain, or in any way control any of the judgments, orders, proceedings, or process of the court first acquiring such jurisdiction.

2. Habeas corpus 🔑41

A court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal or otherwise, unless the prior jurisdiction has been terminated.

3. Prohibition 🔑10(1)

Prohibition will lie to restrain one court from assuming jurisdiction over a matter when another tribunal having concurrent jurisdiction has assumed and is exercising it over the same matter.

4. Habeas corpus 🔑41

The jurisdiction of the superior court over habeas corpus proceeding can be inquired into by a higher court except that under penal statute no other court can review the decision of the superior court in a habeas corpus proceeding. Pen.Code, § 1506.

5. Prohibition 🔑10(2)

The power to issue writs of prohibition extends to restraining the superior court from assuming jurisdiction over any proceeding where it does not possess such jurisdiction, including a habeas corpus proceeding. Const. art. 6, § 4b.

6. Prohibition 🔑10(2)

Where superior court of Santa Barbara had jurisdiction of person and estate of incompetent and was exercising that jurisdiction, and ordered after hearing that incompetent be not moved from certain nursing home and habeas corpus proceedings were instituted in the superior court of San Francisco to secure an order transferring the incompetent which order would have directly violated orders made by the Santa Barbara court. Santa Barbara court having assumed jurisdiction first, prohibition would lie against San Francisco court which had no jurisdiction to proceed. Const. art. 6, § 4b.

◆

Prohibition proceeding by Belmore Browne, as guardian of the person and estate of Ella H. Browne, an incompetent person, against the Superior Court of the State of California, in and for the City and County of San Francisco, and A. J. Fritz, Judge of said Superior Court.

Writ issued.

Freitas, Duffy & Keating, of San Rafael, for petitioner.

Harold V. Daley, of Beverly Hills, and Abbott, Appel & Dains, of San Francisco, for respondent.

PETERS, Presiding Justice.

Petition for a writ of prohibition. It is alleged that petitioner, Belmore Browne, on April 23, 1934, was duly and regularly appointed guardian of the person and estate of Ella H. Browne by the superior court of Santa Barbara county, and that ever since such date has been and now is the duly appointed and acting guardian of the person and estate of Ella Browne; that on November 22, 1937, the guardian filed in the superior court of Santa Barbara county in the guardianship proceeding a certain petition for instructions. That petition, a copy of which is attached to the present petition as an exhibit, sets forth that the guardian had kept the ward in Santa Barbara county until October of 1936, at which time, on the advice of competent psychiatrists, and for

*For subsequent opinion see 107 P.2d 1.

the best interests of the ward, she had been removed to San Francisco, and on the advice of competent named physicians, had been placed in the Greer Home; that the treatment accorded the ward and the personnel of the home are acceptable to the ward, but the ward desires, nevertheless, to return to Santa Barbara; that the attending physician has advised against moving the ward; that one of the ward's children, J. W. Browne, has urged that his mother be returned to Santa Barbara; that the guardian desires instructions on this matter and also desires instructions as to whether letters from J. W. Browne to his mother should be permitted to be received by her uncensored, inasmuch as such letters invariably cause the ward, who is senile and approaching ninety years of age, to become agitated and excited. Pursuant to such petition for instructions, after a hearing at which J. W. Browne did not appear, the Santa Barbara court entered its order instructing the guardian that the ward should remain in San Francisco at the Greer Home; that it was for the ward's best interests that she remain there; that the attending physician should examine, and if need be, censor all incoming mail of the ward.

J. W. Browne, who, as already stated, had failed to appear on the hearing of the above matter, moved, under section 473 of the Code of Civil Procedure, to reopen the case. The Santa Barbara court had another hearing on this petition. On June 20, 1938, that court, after a full hearing, again entered an order instructing the guardian to keep the ward at the Greer Home in San Francisco. The order recites that all parties concerned stipulated in open court that the cause should be submitted on the testimony of a named psychiatrist, who had been appointed by the court. The doctor named by the court testified that the ward Mrs. Browne is sane, but that her mentality is childish, and that she cannot, without guidance, form practical judgments; that considering her age, and her physical and mental condition, it would be hazardous to her well-being to transfer her to Santa Barbara; that several years before she had had a mental illness from which she has recovered; that the excitement incident to her transfer to Santa Barbara might well bring on another such attack; that one of the valves of her heart leaks and that any slight excitement might bring on a fatal heart attack; that he had carefully examined the Greer Home and that the service, quarters and environment were good and adapted to Mrs. Browne's needs; that there is no nursing home in Santa Barbara comparable to the Greer Home and within its price range; that Mrs. Browne's expressed desire to return to Santa Barbara is merely a normal result of her advanced age and condition. At this hearing the guardian expressed to the court his willingness to move Mrs. Browne to Santa Barbara if it could be done safely, but the doctor positively and unequivocally recommended that she remain in San Francisco. It was on this testimony that the Santa Barbara court instructed the guardian to keep the ward in San Francisco. No appeal was taken from the orders of the Santa Barbara court.

The petition for prohibition next recites that on April 7, 1939, Harold V. Daley, who had been the attorney for J. W. Browne in the Santa Barbara proceedings, in San Francisco, filed, on behalf of Mrs. Browne, a petition for habeas corpus. The habeas corpus petition recites that Mrs. Browne is being unlawfully restrained of her liberty at the Greer Home; that she desires to return to Santa Barbara but her guardian and doctors will not permit her to do so; that her health is such she can safely be so transferred. The San Francisco court issued the writ of habeas corpus, whereupon the guardian filed his demurrer and answer. By his demurrer, among other things, the guardian objected to the jurisdiction of the Superior Court of San Francisco, in that the Santa Barbara court had appointed a guardian, was exercising jurisdiction over the matter, and had already passed on the issues presented by the habeas corpus petition. Although the allegations of the demurrer are not as clear as might be desired, we are of the opinion that such allegations not only raised the plea of res judicata, which can properly only be raised by answer, but also raised the question as to whether the Santa Barbara court had exclusive jurisdiction of the controversy. The Superior Court of San Francisco overruled the demurrer, whereupon the petitioner sought prohibition from this court to restrain the trial of the habeas corpus proceeding.

After this court had issued the alternative writ, the respondent filed a demurrer and answer. By the answer the respondent specifically repudiates any desire or intent by the habeas corpus proceeding to free Ella H. Browne from the custody of her guardian. In other words, what the petitioner in the habeas corpus proceeding is admittedly attempting to secure is an order of the San Francisco Superior Court, which would be nonappealable, transferring Ella H. Browne to Santa Barbara, in direct violation of the two orders made by the Santa Barbara court after full hearings in the guardianship proceeding. It would, indeed, be an anomalous situation if, by the writ of habeas corpus in San Francisco, Ella H. Browne could thus collaterally attack the orders of the Santa Barbara court, and secure what in practical effect would be a reversal of the orders of that court.

It is an admitted fact that the Santa Barbara court has jurisdiction of the person and estate of the incompetent and is presently exercising that jurisdiction. It has jurisdiction to modify its prior orders. It has complete jurisdiction to grant full and complete relief in the controversy presented by the habeas corpus proceeding. Under such circumstances the applicable legal principles, amply supported by authorities, are thus stated in 7 California Jurisprudence, page 591, section 14:

[1] "Where two tribunals have concurrent jurisdiction over the same parties and subject-matter, the tribunal in which jurisdiction first attaches retains it exclusively. The other court, if of coordinate jurisdiction only, cannot in any form review, reverse, nullify, restrain or in any way control any of the judgments, orders, proceedings or process of the court first acquiring such jurisdiction. The only case in which the power to interfere with the judgments and decrees of another court of concurrent jurisdiction is where the court in which the action is pending is unable by reason of its jurisdiction to afford the relief sought. * * * The fact that the parties to the proceeding are not the same as the parties to the judgment or decree sought to be enjoined does not relieve the case from the operation of the rule, nor can the consent of the parties change the rule or relax its binding force in any particular case. The rule is established and enforced not so much to protect the rights of parties as to protect the rights of courts of co-ordinate jurisdiction to avoid conflict and confusion in the administration of justice."

A proceeding in habeas corpus is no different in this regard than any other type of proceeding. In 29 Corpus Juris, page 116, section 112, the rule, supported by authorities from many states, is stated as follows:

[2] "Pursuant to a general rule of wide application, and upon which there is no conflict of authorities, it has been held that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated." See, also, 12 Rul. Case Law, p. 1218, sec. 37; State v. Murphy, 132 Mo. 382, 33 S.W. 1136, 53 Am.St.Rep. 491; Commonwealth v. Gordon, 197 Ky. 367, 247 S.W. 45; Amato v. Erskine, 100 Conn. 497, 123 A. 836; Ex parte State, 150 Ala. 489, 43 So. 490, 10 L.R.A., N.S., 1129, 124 Am.St.Rep. 79; People v. Williams, 334 Ill. 241, 165 N.E. 693.

The rule above stated is obviously one of necessity. Where two courts have concurrent jurisdiction over the same controversy, the first to acquire jurisdiction, assuming its power is adequate to completely dispose of the controversy, has complete and exclusive jurisdiction. Any other rule would lead to constant collision between courts and be productive of utmost confusion.

[3] It is also well settled in this state that prohibition will lie to restrain one court from assuming jurisdiction over a matter when another tribunal having concurrent jurisdiction has assumed and is exercising it over the same matter. Strosnider v. Superior Court, 17 Cal.App.2d 647, 652, 62 P.2d 1394; Gorman v. Superior Court, 23 Cal.App.2d 173, 72 P.2d 774; Lee v. Superior Court, 191 Cal. 46, 214 P. 972; see, also, France v. Superior Court, 201 Cal. 122, 255 P. 815, 52 A.L.R. 869.

We do not mean to hold that habeas corpus by one court of concurrent jurisdiction may not properly issue where another court has declared a person incompetent or delinquent, and assumed jurisdiction. In a proper case habeas corpus will issue. This is all that was held in Re Rider, 50 Cal.App. 797, 195 P. 965, so strongly relied on by respondent. In that case the Los Angeles superior court had declared the petitioner a ward of the juvenile court, and she was placed pursuant to that order in juvenile hall. By her petition for habeas corpus in Los Angeles she sought to be permitted to have private consultation with her attorney to prepare for the defense of a felony charge then pending against her—a constitutional privilege which had been denied her by the custodians of juvenile hall. The court held, and properly so, that habeas corpus could be used to secure that privilege—that a person is unlawfully restrained of his liberty when he is deprived of a constitutional right conferred on even those who are confined. But that is not the situation here. In the present case, Ella H. Browne had admittedly been properly and lawfully declared an incompetent, and petitioner in this proceeding has admittedly lawfully and properly been appointed her guardian. Under section 1500 of the Probate Code "The guardian of the person of a ward may fix the residence of the ward at any place in the state, but not elsewhere without the permission of the court". In the present case the guardian did not act on his own initiative but secured two orders of the Santa Barbara court instructing him to place and keep the ward in the Greer Home in San Francisco. No attack is made on the regularity of those proceedings. The Santa Barbara court possesses full power to change or modify its orders if changed conditions occur. Full relief can be secured by Ella H. Browne in the Santa Barbara court. She is not being deprived of any constitutional rights. What has been and is being done for her has been and is being done pursuant to law. In this respect the present case is closer to the case of In re McDermott, 77 Cal.App. 109, 246 P. 89, than it is to the Rider case. In the McDermott case a ward of the juvenile court was permitted by the court to remain in the custody of her parents. Later the court ordered her sent to the juvenile home. The judge of the juvenile court and the custodians of the home refused to permit an attorney to consult with her relative to the change in her custody. In distinguishing the Rider case the court stated (77 Cal. App. page 111, 246 P. page 90):

"One of the essential differences between the Rider Case and the case at bar is that in the former the ward was being detained on a felony charge against her which was about to be prosecuted, which of necessity involved the preparation of a defense, and, as ordinarily incidental thereto, frequent confidential consultations between the defendant and her attorney; while in the instant case the ward has not been accused of the commission of any criminal offense, but is being detained in the juvenile home primarily under the original order by which she was adjudged a ward of the juvenile court; and, secondarily, because of some alleged irregularities in her conduct necessitating or at least suggesting the desirability of a change in her care and custody. It does not appear that any trial or proceeding of any character is pending or contemplated with reference thereto.

"The order of the court by which petitioner was made a ward of the juvenile court of necessity had the effect of transferring the matter of her guardianship from her parents to the court itself, and it thereupon became discretionary with the court whether to permit the minor to return to the home of her parents or to place her within the care and custody of some state institution."

The respondent argues that whether or not the above principles are correct, prohibition can never issue to restrain a habeas corpus proceeding, for the reason that prohibition can only issue to an inferior tribunal; that so far as habeas corpus is concerned, the superior court is not an inferior tribunal but is on the same plane with the Supreme Court and District Courts of Appeal, citing Matter of Zany, 164 Cal. 724, 130 P. 710; Matter of Hughes, 159 Cal. 360, 113 P. 684; Derrer v. Superior Court, 129 Cal.App. 154, 18 P.2d 371, and similar cases. In the Zany case it was held that the Supreme Court, under the law then existing, had no power to grant a hearing on a habeas corpus proceeding after decision by the District Court of Appeal. In the course of the decision it was stated (164 Cal. page 726, 130 P. page 710): "The result has been that, with reference to such proceedings, the Supreme and superior courts, to each of which was given the power to issue writs of habeas corpus, stood upon the same plane, neither being inferior to the other in any other sense than that a superior court, in determining any such matter, would naturally follow a precedent established by the highest court in the state, if any such precedent had been established."

[4] This rule does not mean that for all purposes the superior, appellate and Supreme courts are on a parity in habeas corpus proceedings. It certainly does not mean that where a trial court is proceeding without jurisdiction to hear a habeas corpus proceeding the appellate or Supreme courts are powerless to prevent by prohibition such abuse of power. This was clearly pointed out in France v. Superior Court, 201 Cal. 122, 255 P. 815, 817, 52 A.L.R. 869. In that case France was convicted of a felony

and his conviction affirmed. Before the remittitur issued there was filed in the superior court a petition for a writ of habeas corpus. After the remittitur had issued the superior court granted the writ and ordered France discharged from custody. The district attorney moved for an order of court remanding France to the custody of the sheriff to be delivered by him to San Quentin in accordance with the terms of the affirmed judgment. France instituted prohibition proceedings. Relying upon the Zany case and other cases of a similar nature, the petitioner contended that the order of the trial court in the habeas corpus proceeding was a final judgment. The respondents argued that the decision in the habeas corpus proceeding was void for the reason that the trial court had no jurisdiction, the cause then being on appeal. After stating the rule quoted from the Zany case, supra, the court in the France case stated: "By this is meant, however, as we understand these decisions, 'that the decision of any court in a habeas corpus proceeding, *provided the court has jurisdiction,* cannot be reviewed by any other court in any way.' Matter of Zany, supra [164 Cal.] page 726, 130 P. 710." (Italics ours.) In other words, *jurisdiction* of the superior court over the habeas corpus proceeding can be inquired into by a higher court, although, except as provided in section 1506 of the Penal Code, no other court can "review" the decision of the superior court in a habeas corpus proceeding. Matter of Hughes, supra. In the France case it was held, citing many cases, that a superior court has no jurisdiction to grant habeas corpus in a criminal case after an appeal; that its order issuing the writ was void, and that the appellate court possesses the power to declare such order void. If, as contended by respondent in the present case, the superior court was for all purposes a court of concurrent jurisdiction in habeas corpus proceedings with the Supreme Court, the latter court would possess no power to declare an order of the superior court in a habeas corpus proceeding void. The France case repudiates such doctrine.

[5] There appears to be no case in this jurisdiction directly holding that the appellate courts have no power to restrain by prohibition a trial court from hearing an application for habeas corpus, nor does there appear to be any case directly holding to the contrary. There are cases from other jurisdictions, however, holding that such usurpation of jurisdiction by a trial court may be controlled by a higher court by prohibition. State v. Murphy, 132 Mo. 382, 33 S.W. 1136, 53 Am.St.Rep. 491; Commonwealth v. Gordon, 197 Ky. 367, 247 S.W. 45; Ex parte State, 150 Ala. 489, 43 So. 490, 10 L.R.A.,N.S., 1129, 124 Am.St.Rep. 79. The power to issue writs of prohibition is conferred on this court by the Constitution. (Art. VI, sec. 4b.) That power extends to restraining the superior court from assuming jurisdiction over any proceeding where it does not possess such jurisdiction, including, in our opinion, a habeas corpus proceeding. It would result in utmost confusion in the administration of justice if no appellate court had power to prevent a trial court from proceedings to hear a habeas corpus proceeding over which it clearly had no jurisdiction. The power to prevent such usurpation of power in our opinion, rests with the higher courts.

[6] As already indicated, we do not mean to hold that one superior court would not have jurisdiction to issue habeas corpus at the instance of a ward physically present in the county where the writ is sought after guardianship proceedings have been instituted in another superior court. The Rider case, supra, illustrates such a situation. But where the habeas corpus proceeding is attempted to be used, as here, to collaterally attack the orders of another court, that court having assumed jurisdiction first, the second court has no jurisdiction to proceed under the authorities already cited. See, also, on the general principle, In re Culp, 2 Cal.App. 70, 83 P. 89; In re Inman, 32 Cal.App.2d 130, 89 P.2d 421.

For the foregoing reasons it is ordered that the demurrer to the petition be overruled and that the writ of prohibition issue as prayed for.

We concur: KNIGHT, J.; WARD, J.

35 Cal.App.2d 226

In re CONE'S ESTATE.

STOBBS v. COLONEUS et al.

Civ. 11972–S.

District Court of Appeal, Second District, Division 1, California.

Oct. 20, 1939.

Rehearing Denied Nov. 10, 1939.

1. Jury ⚷25(6)

Where defendants in will contest made a motion on November 8 to set case for trial and on November 12 the motion was continued to November 16, at which time case was set for trial on December 13, and contestant on November 13 and again on November 16 had demanded a jury trial, and notice of demand had been served and filed and jury fee paid, contestant had not waived right to jury trial by failure to demand it within proper time. Code Civ.Proc. §§ 473, 631, subd. 4; Probate Code, § 382.

2. Jury ⚷19(7½)

Where original probate of will was granted without contest, in a subsequent will contest contestant was entitled to trial by jury, unless contestant had waived such right. Probate Code, § 382.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Proceeding in the matter of the estate of Emma S. Cone, also known as E. S. Cone, deceased, by Clayton R. Stobbs, contestant, against Carl P. Coloneus, individually and as executor of the estate of Emma S. Cone, deceased, and others, wherein contestant sought a revocation of the probate of a will and codicil executed by deceased. From a judgment denying the requested relief, contestant appeals.

Reversed.

Arthur J. Mullen, Raymond Tremaine, and Franklin Knox, Jr., all of Los Angeles, John E. Yates, of Chicago, Ill., and Laurence B. Martin, of Los Angeles, for appellant.

Claude I. Parker, Ralph W. Smith, J. Everett Blum, Loren A. Butts, and James C. Ingebretsen, H. William Hess, and Clyde H. Morrill, all of Los Angeles, for respondents.

YORK, Presiding Justice.

This appeal involves a contest after probate of the last will and codicil of Emma S. Cone, deceased, instituted by Clayton R. Stobbs, a nephew of decedent, who was not mentioned in either document. The will, olographic in character, which was executed on August 20, 1936, and the codicil which was executed on January 6, 1937, were admitted to probate on April 21, 1937, and letters testamentary issued to Carl P. Coloneus, named therein as executor. After a protracted trial of the issues joined by the contest and the answer thereto, the trial judge concluded that "the said last will and testament of Emma S. Cone dated August 20, 1936, and the said Codicil to said will dated January 6, 1937, were and are valid testamentary acts of said decedent, Emma S. Cone". Further, that "the plaintiff contestant is not entitled to a revocation of the probate of said last will and testament * * * and said codicil".

Appellant's contentions upon this appeal are in substance (1) that the court erred in denying appellant relief from an alleged waiver of a jury trial; (2) that the will was obtained through the use of undue influence and fraud; (3) that at the time said will was executed testatrix was suffering from an insane delusion; (4) that testatrix was not mentally competent by reason of disease and her infirmities to execute a valid or subsisting will or codicil at the time or times when she is purported to have so executed said documents.

The testatrix, who was a widow of means and extensive business interests, the estate herein having an appraised value of approximately $650,000, on August 20, 1936, executed an olographic will in which she provided for the payment of large sums of money, as well as liberal monthly incomes, to various relatives consisting of her brothers, sisters, nephews and nieces. She appointed as executor her first cousin, Carl P. Coloneus, who had been her confidential adviser and business manager since 1926, and devised to him her interest in the Cone Oil Company which he had been managing under her direction for a number of years. She named as a beneficiary of her bounty Leonard Anderson, a young man who had entered her employ in 1922 during the life of her husband, and who had thereafter become a member of her household, driving her car and accompanying her on trips, he being generally accepted and regarded as her son. She also named as a beneficiary, Mrs. Ella L. Abdill, who had been in testatrix' employ as a housekeeper since 1924, and who had nursed her throughout her last illness.

With reference to appellant's first point, it appears that on November 8, 1937, respondents made a motion to set contest of will for trial after service on November 3rd of a memorandum for setting for trial, and service on November 5th of notice that trial had been set in Department 25 for November 12th. A minute order of the above-named department shows that on November 12th a motion to set will contest for trial was continued to November 16th. On November 13th, appellant filed a written demand for a jury trial, after service thereof upon counsel for respondents. The minute orders of November 16th show (1) motion to set will contest for trial was transferred to Department 1; (2) "Matter of setting or continuance of trial of contest after probate. By order of Court transferred from 25 and set for Dec. 13 at 9:30 A. M., Department 1." On December 6, 1937, a minute order was entered as follows: "Minutes of Nov. 16, 1937, ordered corrected nunc pro tunc to show that the court holds that a trial by jury has been waived by failure to demand a jury within the statutory time." On November 29th there was filed a notice of trial by counsel for respondents to the effect that said trial had been continued to December 13, 1937. On December 9th, appellant filed a notice of motion to have a jury trial and for relief under section 473 of the Code of Civil Procedure, on the grounds that he was entitled to such jury trial, or if he had waived his right thereto that it was through mistake, inadvertence, surprise or excusable neglect, which said motion was by the court denied on December 10, 1937.

Upon this appeal, appellant contends that there was no actual setting of the contest for trial on November 12th, and that said contest was not actually set for trial until November 16th, when it was set for trial on December 13, 1937; therefore, no waiver of a jury trial was made by virtue of subdivision 4 of section 631, Code of Civil Procedure, to-wit: "Trial by jury may be waived by the several parties to an issue of fact in manner following: * * * 4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation." In the instant cause the setting was made upon notice.

Referring to contests after probate, section 382 of the Probate Code provides: "If the original probate was granted without a contest, *a trial by jury must be had,* as in the case of a contest before probate, unless a jury is waived as provided by the Code of Civil Procedure. * * *" (Emphasis added.)

The Supreme Court in the case of Mutual Building & Loan Association v. Corum, 220 Cal. 282 at page 287, 30 P.2d 509, at page 511, in an interpretation of subdivision 4 of section 631 of the Code of Civil Procedure, held as follows: "We are of the opinion that the language used in section 631, Code of Civil Procedure, 'at the time the cause is first set upon the trial calendar' is synonymous with the words, 'at the time the case is set for trial.' In matters of court procedure it is most important that the steps to be taken should be easily ascertainable and readily understood and that the rights of clients to jury trials, or other aids to the administration of justice, should not be jeopardized by a strained construction of a statute prescribing judicial practice and procedure. A strained construction should, therefore, be avoided and the words given the meaning they commonly convey.

"Prior to the very existence of the judicial council and prior, of course, to the promulgation of rule I, it was assumed and taken for granted that the time specified in subdivision 4 of section 631, Code of Civil Procedure, at which a demand for a jury trial must be made if the right to a jury trial was to be protected and preserved, was at the time a definite date was assigned by the presiding judge for trial. Hertter v. Addis, 89 Cal.App. 160, 265 P. 298, 300. * * * Since that decision, other cases have accepted this construction as the true one and have postulated their conclusions upon the premise that the time 'the cause is first set upon the trial calendar' is synchronous with the time 'the case is first set for trial.' Hoffman v. Southern Pac. Co., 101 Cal.App. 218, 281 P. 681; Stern v. Hillman, 115 Cal.App. 156, 300 P. 972, 973; McGregor v. Wright, 117 Cal. App. 186, 3 P.2d 624, and Dunham v. Reichlin, 217 Cal. 289, 18 P.2d 664."

[1] The record before this court conclusively shows that the contest herein was not set for trial until November 16, 1937, at which time appellant demanded a jury trial; also, that three days prior to that date appellant had served and filed his

notice that he demanded that the contest be tried before a jury, and as well had paid the regular jury fee of $24.

[2] Since the original probate of the will was granted without a contest, appellant was entitled to a trial by jury unless he had waived such right (sec. 382, Prob. Code); and by demanding a jury trial on November 16th, at which time the contest was set for trial on December 13th, appellant did not waive that right.

In the circumstances, appellant's first point must be sustained. For the reasons stated, it is unnecessary to pass upon appellant's further contention that the findings are not supported by the evidence.

The judgment appealed from is reversed.

We concur: DORAN, J.; WHITE, J.

ELLINGSON v. WALSH, O'CONNOR & BARNESON et al.*

Civ. 12265.

District Court of Appeal, Second District, Division 2, California.

Oct. 23, 1939.

Rehearing Denied Nov. 17, 1939.

Hearing Granted Dec. 22, 1939.

1. Partnership 🔑238

The section of the Uniform Partnership Act providing that a partner admitted into an existing partnership is liable for partnership obligations arising before his admission, but that such liability shall be satisfied only out of partnership property, must be fairly and reasonably construed so as to make it effective. Civ.Code, § 2411.

2. Statutes 🔑174, 181(2)

A statute should never be construed so strictly as to render it absurd or nugatory.

3. Partnership 🔑238

Under statute providing that a person admitted as a partner into an existing partnership is liable for all pre-existing partnership obligations, except that such liability shall be satisfied only out of partnership property, liability of partner admitted into existing partnership for rent accruing on leased partnership premises during period he was a partner could be satisfied only out of partnership property, where lease which contained provision that payment of rent was a covenant running with land was executed prior to admission of partner into partnership. Civ.Code, §§ 322, 1462, 1463, 2411.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action to recover rental due under a written lease by G. E. Ellingson, as receiver of the First National Bank of Beverly Hills (a national banking association), against Walsh, O'Connor & Barneson (a copartnership), L. T. Barneson, and others. From a judgment for the plaintiff and against all the defendants, L. T. Barneson appeals.

The lower court instructed to modify judgment.

Ackerman, Wayland & Mathews, of San Francisco, for appellant.

Rollin L. McNitt, of Los Angeles, (Edythe Jacobs, of Los Angeles, of counsel), for respondent.

WOOD, Justice.

Respondent Ellingson, as receiver of the First National Bank of Beverly Hills, commenced this action against the partnership of Walsh, O'Connor & Barneson and the individual members thereof for the purpose of recovering certain rental due according to the terms of a written lease covering the premises occupied by the partnership. The action was submitted upon an agreed statement of facts and a judgment for the amount of rental due, attorney's fees and costs was entered against the partnership and all of its individual members who were general partners. Lionel T. Barneson, one of the general partners, has taken this appeal from said judgment.

Walsh, O'Connor & Co., a special partnership, leased the premises in question on October 4, 1929, for a period of ten years for a total rental of $66,000 payable in monthly instalments of various amounts. Thereafter the original lessor assigned the lease to the First National Bank of Beverly Hills. In 1930 the limited partnership of Walsh, O'Connor & Barneson was formed and all of the rights of Walsh, O'Connor & Co. under the lease were assigned to the last-mentioned partnership. On April 21, 1931, one of the general partners withdrew from Walsh, O'Connor & Barneson and on April 28, 1931, appellant Lionel T. Barneson became a general partner in said firm. Appellant had no connection whatever with Walsh, O'Connor & Co. and was not associated with Walsh, O'Connor & Barneson prior to April 28, 1931. The judgment represents the amount of rental due from the firm of Walsh, O'Connor & Barneson for the period from March 1, 1932, to January 25, 1933, during all of which time appellant was a general partner in said firm. The judgment contained no restrictions concerning the manner in which it was to be satisfied. From the time that it took possession until February, 1932, the firm of Walsh, O'Connor & Barneson occupied the leased premises and paid the rental provided for in the lease to the First National Bank of Beverly Hills. The lease contained a covenant by the lessee not to sublet the premises without the written consent of lessor. In accordance with the provisions of the covenant Walsh, O'Connor & Barneson in February, 1932, obtained the written consent of the lessor to sublet the premises and did in fact sublet the premises to a third party who was in possession during all of the time for which the rental is sought to be recovered.

---

*For subsequent opinion see 104 P.2d 507.

The sole contention presented by appellant is that the court erred in not restricting the manner in which the judgment could be satisfied as against him. It is urged that by virtue of the provisions of section 2411 of the Civil Code the judgment as to appellant should have been so restricted that it could only be satisfied out of partnership property and not out of his personal assets. Section 2411 of the Civil Code, which is a part of the Uniform Partnership Act adopted in this state, provides as follows: "A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property."

On behalf of respondent it is contended that section 2411 has no application for the reason that appellant was admitted into a new partnership and not into an "existing" partnership. Upon the theory that when the membership of a partnership is changed a new partnership comes into existence in legal contemplation, it is argued that when appellant became a member of Walsh, O'Connor & Barneson a new partnership was formed which was separate and distinct from the former firm of the same name, of which he was not a partner; that this new partnership either by assignment and assumption of the obligations of the lease or by attornment to respondent became liable for the rental as its own obligation and that the members of the new partnership are individually liable.

[1, 2] If respondent's position relative to the result of a change in the membership of a partnership is to be sustained it is obvious that the provisions of section 2411 of the Civil Code would be rendered nugatory since in no case could a person be admitted into an "existing" partnership Under settled rules of statutory construction we must, if possible, fairly and reasonably construe the code section in question in such manner as to make it effective and to prevent its being rendered nugatory. "A statute should never be construed so strictly as to render it absurd or nugatory." Walters v. Bank of America, etc., Ass'n, 9 Cal.2d 46, 69 P.2d 839, 842, 110 A.L.R. 1259. The legislature doubtless did not intend the absurd result which would follow from respondent's argument. On the contrary, it is apparent that the intention was to meet situations such as the one presented in the instant case, disregarding for the purpose of the section the legal theory of a new partnership resulting from a change in membership. In his brief appellant presents a persuasive discussion including excerpts from the commissioners' notes to section 17 of the Uniform Partnership Act, which is in substantially the same language as the section under review, in an endeavor to show that section 2411 affords, in line with his interpretation, ample protection and fair treatment for all creditors alike, those of the earlier partners as well as those of the partnership after appellant's admission as a partner. The court is not called upon to decide, however, whether all are accorded exact protection under the section; rather, it is our sole duty to determine the legislative intent in enacting it.

It cannot be disputed that obligations were created by the execution of the lease on October 4, 1929, and that these obligations arose long before appellant became a partner in the firm. Respondent makes the contention, which is conceded by appellant, that the partnership of which appellant was a member, which for clarity we will designate appellant's partnership, became liable for the payment of the rental due during the time covered by the complaint. This contention is based in part upon the occupancy of the premises by appellant's partnership, which respondent claims resulted in a privity of estate with the lessor, and in part upon the action of appellant's partnership in obtaining the consent of the lessor to the subletting of the premises in accordance with the terms of the lease. Respondent's contention may be conceded but we are still faced with the clear language of the statute which requires that notwithstanding the liability of appellant's partnership and the liability of appellant as a member thereof, his "liability shall be satisfied only out of partnership property". The sole question involved is whether appellant's liability may be enforced against his personal estate or whether his liability shall be satisfied only out of partnership property. In deciding this question the principles underlying the law of partnership should govern. In considering respondent's reference to the law of landlord and tenant it should be remembered that appellant personally did not assume the relationship of landlord and tenant with the lessor but that such relationship was between appellant's partnership and the lessor. It is immaterial whether liability of appellant's partnership is based upon privity of estate or privity of contract for in either case the obligation to pay rent was an obligation which arose at the time the lease was executed and continued during the occupancy of the partnership to which the lease was assigned and also continued during the occupancy of appellant's partnership. The fact that a right of action accrued during the occupancy of appellant's partnership does not change the basic fact that the obligation arose prior to the existence of appellant's partnership. It is significant that a provision in a lease for the payment of rental is expressly made a covenant running with the land. (Secs. 1462, 1463, Civ.Code.)

Support is given to appellant's contention by the decisions construing the statute formerly in force in California providing for stockholders' liability. Section 322 of the Civil Code, as it formerly was in force, St. 1905, p. 396, provided: "Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. * * *" The terms, *obligation* and *liability*, are practically synonymous. In 49 Corpus Juris, page 849, we find: "The term 'liability' has been defined as meaning 'obligation', and 'obligation' has been said to be equivalent to, and practicaly synonymous with, 'liability'. 'Obligation' has been defined as a legal liability; liability generally, whether such liability be founded in contract or tort." In passing upon actions to enforce the liability of stockholders the California courts have uniformly held that the liability of stockholders was created at the time of the execution of contracts which were binding upon the corporations rather than at the time when the obligations of the contracts were sought to be enforced. Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am.St.Rep. 87; Chambers v. Farnham, 182 Cal. 191, 187 P. 732. In Fry v. Baltimore Hotel Company, 80 Cal.App. 415, 422, 252 P. 752, 755, the court said: "Undoubtedly an action for the breach of a lease, whether it be for damages to the freehold, for failure to pay rent, or for holding over after the termination of the tenure, founded upon the original contract, creates a stockholder's liability, commencing at the date of the execution of the lease and not from the date of the breach of covenant." In Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939, 941, the plaintiff sought to enforce liability against individuals who were not stockholders of a corporation at the time of the execution of a contract for the future delivery of goods but they were stockholders of the corporation at the time the goods were delivered and accepted. In holding the defendants not liable the court said that "those who are stockholders when the 'liability' is created or incurred are alone liable in any actions arising from its breach".

[3] We conclude that section 2411 of the Civil Code sets forth the limit of appellant's liability and that the judgment should have been so restricted that it could be satisfied as against appellant only from partnership property. The trial court is directed to modify the judgment accordingly. The appellant shall recover costs on appeal.

We concur: MOORE, P. J.; McCOMB, J.

35 Cal.App.2d 257

WALKER MINING CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 6281.

District Court of Appeal, Third District, California.

Oct. 23, 1939.

Hearing Denied Dec. 22, 1939.

1. Constitutional law ⚷275(2)
Workmen's compensation ⚷1999

The Industrial Accident Commission exceeded its jurisdiction in submitting and determining self-insured employer's petition to terminate its liability on an award without permitting employer to obtain a medical examination to ascertain present physical condition of claimant who was in Iowa and to cross-examine him in that regard, and in effect commission's ruling amounted to a denial of "due process of law" by refusing to permit employer to cross-examine a witness on a material issue. St.1917, p. 845, § 16; U.S.C.A.Const. Amend. 14.

[Ed. Note.—For other definitions of "Due Process of Law," see Words & Phrases.]

2. Constitutional law ⚷314

The administration of justice is founded on the principle that every litigant shall have a fair opportunity to present to the court material evidence in support of his valid claim.

3. Witnesses ⚷4

One of the duties which a citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony when he is properly summoned.

4. Witnesses ⚷1

Courts and judicial tribunals have inherent power to compel the attendance of witnesses necessary to a just determination of proper issues.

5. Witnesses ⚷1

The authority of courts and judicial tribunals to compel the attendance of witnesses necessary to a just determination of proper issues is necessarily incident to the power to adjudicate a cause.

6. Witnesses ⚷8

A litigant may waive his right to procure the evidence of a material witness by his lack of due diligence or otherwise.

7. Workmen's compensation ⚷1309, 1686, 2021

A self-insured employer should have been notified that its petition to terminate liability on a compensation award, to cross-examine claimant, who was in Iowa, and for permission to procure a medical examination of claimant, would be denied before proceeding pending before Industrial Accident Commission on petition and claimant's counter application for a rating of permanent disability was arbitrarily submitted without privilege of taking claimant's testimony, and employer should have been afforded opportunity of purging itself of a charge of lack of diligence in procuring claimant's deposition before matter was submitted and its petition denied. St.1917, p. 845, § 16; Code Civ.Proc. § 2024 et seq.; U.S.C.A.Const. Amend. 14.

8. Workmen's compensation ⚷1703, 1936

The Industrial Accident Commission is vested with a sound discretion to regulate and control the cross-examination of witnesses in proceedings before it, and its award will not be disturbed on certiorari for mere errors of procedure.

9. Workmen's compensation ⚷1686, 1703

The authority of the Industrial Accident Commission to regulate and control the cross-examination of witnesses in proceedings before it will not justify an arbitrary denial of the right of a litigant to procure competent testimony by deposition or otherwise where the application therefor is seasonably made and pursued with due diligence according to established rules of procedure.

◆

Petition by the Walker Mining Company, self-insured employer, for a writ of certiorari to review an order of the Industrial Accident Commission of the state of California denying its application for rehearing and for the privilege of a medical examination of Archie Galeazzi, claimant, in whose favor an award had been made under the Workmen's Compensation Act.

Writ granted and award annulled, with directions.

Hearing denied; CARTER, J., dissenting

W. N. Mullen and James C. McDermott, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

THOMPSON, Acting Presiding Justice, delivered the opinion of the court.

By means of certiorari the petitioner seeks to review an order of the Industrial Accident Commission denying its application for rehearing under section 64 of the Workmen's Compensation Act, St.1917, p. 873, and for the privilege of a medical examination of the claimant under section 16 of the same act, after an award had been previously made upon findings adopted to the effect that the claimant sustained "temporary total disability" as a result of injuries received in the course of his employment in a mine. The petitioner's application to terminate the award for compensation was denied. After fixing time by consent for taking the deposition of the claimant before the Industrial Accident Commission of Iowa, the proceeding was dismissed by direction of the California commission, without notice or consent of the employee and without an opportunity for further medical examination or to cross-examine the claimant. It is contended the dismissal of that proceeding and the refusal to permit the right to examine the claimant regarding his present physical condition constitutes a denial of due process and an excess of jurisdiction on the part of the commission.

The petitioner was a self-insured mining corporation. The claimant, Archie Galeazzi, was injured in the course of his employment with the Walker Mining Company, by an explosion which occurred in the mine. Upon a claim for compensation the Industrial Accident Commission adopted findings May 16, 1938, determining that the claimant sustained "temporary total disability" continuing from February 19, 1937, to September 14, 1937, and allowed him compensation amounting to $586.57, and $10.27 per week from January 12, 1938, "until the termination of disability or the further order of the Commission". July 7, 1938, the claimant filed an application for adjustment of his claim on the basis of 50 per cent disability, asking for a rating of "permanent disability" and an allowance of costs for necessary future medical treatment. On July 12th of the same year, the Walker Mining Company filed its opposition thereto together with a petition to terminate its liability based on the previous findings of the commission and upon medical reports. A hearing on the opposing petitions was duly set for August 15th. The claimant was then absent from the state of California. He was in the state of Iowa, and unable to be present, but was represented by his attorney. Testimony was adduced. On demand of the Walker Mining Company to be permitted to cross-examine the claimant and to procure a medical examination of him to ascertain his present condition, the matter was submitted to the Industrial Accident Commission of Iowa for that purpose. The hearing was then continued by the California commission to procure the report of that proceeding before the Iowa commission. Pursuant to instructions, the Iowa commission notified the parties to be present for the taking of testimony on December 20, 1938. Upon application, the time for hearing was vacated, and the California commission was so notified. December 17, 1938, the California commission communicated with the Iowa commission requesting that the matter be reset for a later date and that the respective parties be notified of the time of the hearing.

It appears that previous to the fixing of the date of hearing by the Iowa commission, the claimant contended that his testimony upon the rehearing should be taken by deposition as provided by article IV, part 4, title 3, chapter 3, section 2024 et seq., of the Code of Civil Procedure, and not by the Iowa commission. This was not conceded by adverse counsel, but on November 30, 1938, the attorney for the mining company wrote to the Iowa commission, stating in part:

> "Since counsel for the applicant is making objections to the manner in which this deposition was to be set, I do not believe it will go ahead as scheduled. The Industrial Accident Commission of California will communicate with you very shortly, as this has been the advice of Mr. Townsend to me."

The California commission did not concede that it was without jurisdiction to submit the matter of taking testimony to the Iowa commission as distinguished from the procedure of taking a deposition pursuant to the provisions of the Code of Civil Procedure above referred to. It is asserted the California commission, under the provisions of section 60 of the Workmen's Compensation Act, St.1933, p. 2246, and the rules of that commission previously adopted in pursuance thereof, had jurisdiction to appoint the Iowa commission as referee to take the testimony. With that contention we agree. But that is immaterial in the determination of this writ of review.

We merely have to decide whether the Walker Mining Company was deprived of its constitutional right to cross-examine the claimant on its application to terminate its liability for the alleged reason that the claimant had fully recovered and that he was not permanently disabled.

It appears that all parties did finally agree that the proceeding might be heard by the Iowa commission. Evidently they expected a new date to be set by that tribunal for the taking of testimony. The California commission also understood that to be conceded. Mr. Townsend, representing the California commission, wrote the Iowa commission December 17, 1938, saying that the letter advising the Iowa commission that the matter would not be heard on December 20th "was unwarranted". The Iowa commission was then requested in that letter to reset the matter for hearing, stating that:

> "I have advised the attorneys. * * * Said attorneys have both agreed that the taking of the deposition as scheduled in your notice proceed at the time and place mentioned therein. All parties have arranged to appear."

The proceeding had already been dropped from the calendar of the Iowa commission, and the parties were not subsequently notified to appear. Evidently there was a misunderstanding regarding the time for hearing that matter. Several months elapsed, and the Iowa commission failed to reset the matter for hearing, or to notify the respective parties of a subsequent time and place of hearing. There is no adequate showing that this failure was due to any fault of the Walker Mining Company, or to anyone else, unless it may be said the Walker Mining Company as one of the actors in that proceeding was dilatory in failing to procure a hearing. We think it was not culpable under the circumstances of this case.

Without notice to the employer and insurer, Walker Mining Company, the California commission subsequently directed the Iowa commission to dismiss the proceeding pending before it to take the testimony of the claimant, which was done. The counter-applications of the claimant for a rating of "permanent disability" and of the employer to terminate its liability and to be permitted to procure a medical examination to ascertain the claimant's present physical condition and to cross-examine him in that regard were set for hearing before the California commission. The claimant still remained in the state of Iowa and he was unable to be present at that hearing. The Walker Mining Company objected to that hearing on account of the absence of the claimant and it then renewed its demand to be permitted to cross-examine the claimant regarding his present physical condition, which objection and requests were denied. No new evidence was then adduced. March 20, 1939, the California commission adopted findings approving and readopting its former findings in every respect, except that upon the same evidence formerly adduced, it was found that the claimant's injuries caused "permanent disability" to an extent of 32½ per cent of his normal condition, entitling him to compensation of $20.53 for 130 weeks aggregating the sum of $2,668.90, less the amount which had been formerly paid on that account. The insurer's petition for a rehearing under section 64 of the Workmen's Compensation Act was filed, presented on affidavits and denied. This petition for a writ of review was then filed.

[1-5] We are of the opinion the California Industrial Accident Commission exceeded its jurisdiction in submitting and determining the insurer's petition to terminate its liability without permitting it to obtain a medical examination to ascertain the present physical condition of the claimant, and to cross-examine him in that regard. In effect, that ruling amounted to a denial of the insurer's constitutional right to due process by refusing to permit it to cross-examine a witness upon a material issue. In the case of Saunders v. Shaw, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163, it was held that the submission and determination of a case without giving a party thereto the opportunity of presenting his evidence on a material issue resulted in a denial of due process guaranteed by the fourteenth amendment to the federal Constitution, U.S.C.A. The administration of justice is founded on the principle that every litigant shall have a fair opportunity to present to the court material evidence in support of his valid claim. One of the duties which a citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony when he is properly summoned. It is within the inherent powers of courts and judicial tribunals to compel the attendance of witnesses necessary to a just

determination of proper issues. Such authority is necessarily incident to the power to adjudicate a cause. 70 C.J. 34, sec. 3. Our statutes furnish ample authority to compel the taking of depositions of witnesses who are unable to attend the trial of a case.

[6, 7] To be sure a litigant may waive his right to procure the evidence of a material witness by his lack of due diligence or otherwise. It is the theory of the Industrial Accident Commission that the Walker Mining Company waived its right to take the deposition of the claimant in the present case by suffering unnecessary delay in enforcing the taking of the deposition of Archie Galeazzi. The claimant was the actor in his petition for compensation based on alleged total disability. It is reasonable to believe from the record in this proceeding that the Walker Mining Company in good faith assumed that its application to take the testimony of the claimant would be reset for hearing before the Iowa commission, and that it was not guilty of a lack of diligence in that regard. The insurer should have been given notice that its petition to terminate liability would be denied before the proceeding which was then pending was arbitrarily submitted without the privilege of taking the testimony of the claimant. We are of the opinion the insurer should have been afforded the opportunity of purging itself of a charge of lack of diligence before the matter was submitted and its petition denied. Union Lumber Co. v. Industrial Acc. Comn., 124 Cal.App. 584, 590, 12 P.2d 1047.

[8, 9] Clearly the commission is vested with a sound discretion to regulate and control the cross-examination of witnesses in proceedings before that tribunal, and its award will not be disturbed on certiorari for mere errors of procedure. But that authority will not justify an arbitrary denial of the right of a litigant to procure competent testimony by deposition or otherwise when the application therefor is seasonably made and pursued with due diligence according to established rules of procedure. In the case of Western Pipe & Steel Co. v. Industrial Acc. Comn., 194 Cal. 379, 228 P. 859, an application to take the deposition of a witness living in Italy, which was made for the first time in the progress of the hearing, was denied on the ground that it came too late. That ruling was properly affirmed. That case presented a clear showing of lack of diligence and warranted the denial by the commission. In the present proceeding, however, the application was made in due time, and we think the record fails to show a lack of diligence on the part of the Walker Mining Company. In the interest of justice we are of the opinion the writ of review should be granted for lack of jurisdiction and for a denial of due process.

The award is annulled, and the commission is directed to reset for hearing the petition of the Walker Mining Company to terminate its liability, and afford it a reasonable opportunity to procure the evidence of the claimant.

We concur: DEIRUP, J. pro. tem.; TUTTLE, J.

QUINN v. ROSENFELD.*

Civ. 11064.

District Court of Appeal, First District, Division 2, California.

Oct. 26, 1939.

Hearing Granted Dec. 22, 1939.

1. Automobiles 🔑9

Whenever the state sees fit to adopt a general scheme for the regulation and control of motor vehicles on the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned.

2. Automobiles 🔑217(3)

The statute requiring every pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk at an intersection to yield the right of way to all vehicles on the roadway, does not prohibit a pedestrian from crossing between intersections, but merely requires him to yield the right of way. Vehicle Code, § 562, St.1935, p. 188.

3. Automobiles 🔑9, 217(3)

The provisions of a San Francisco ordinance prohibiting a pedestrian, except when necessary, from being in any roadway other than in a safety zone or crosswalk do

---

*For subsequent opinion see 102 P.2d 317.

not conflict with statute requiring a pedestrian crossing a roadway at any point other than within a crosswalk to yield the right of way to vehicles on the roadway, and hence ordinance was controlling on question of contributory negligence of pedestrian who was struck by automobile while crossing street between intersections, where it was not necessary for him to use street, and facts did not involve last clear chance doctrine. Vehicle Code, § 562, St.1935, p. 188.

4. Automobiles ⚿217(3), 226(2)

Under San Francisco ordinance prohibiting pedestrians from being in a roadway other than in a safety zone or crosswalk except when necessary, a pedestrian who was struck by automobile while crossing street between intersections was guilty of contributory negligence as a matter of law which proximately contributed to his injuries, where it was not necessary for him to use the street, and facts did not involve the last clear chance doctrine.

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Hugh J. Quinn against M. Rosenfeld to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals.

Reversed.

Cooley, Crowley & Supple, of San Francisco, for appellant.

James C. Purcell and William E. Ferriter, both of San Francisco, for respondent.

STURTEVANT, Justice.

This action was brought by plaintiff to recover damages for injuries sustained in an automobile accident. It was tried by the court sitting without a jury. Later the court made findings in favor of plaintiff and from the judgment entered thereon the defendant has appealed. He contends that the judgment is not sustained by the findings, that the finding that the defendant was negligent is not sustained by the evidence, and that the finding that the plaintiff was not guilty of contributory negligence is not sustained by the evidence and is directly contrary thereto.

At the time of the accident complained of the plaintiff was a fireman attached to Five Truck and Two Chemical of the San Francisco Fire Department. The firehouse is on the north side of Geary street, which runs east and west. The block is bounded on the west by Divisadero street and on the east by Scott. Geary is an arterial highway and each of the crossings is marked by stop signs and each has crosswalks duly marked. The locality is a residence district. There was no crosswalk in between Divisadero and Scott streets. The plaintiff left the firehouse and entered Geary street with the intention of going to a grocery store located on the southeast corner of Divisadero and Geary. He could have gone to Divisadero and crossed over on the marked pedestrian lanes to the store. The record contains no evidence showing it was "necessary" for him to use, but he did use, the street. After he had reached the north rail of the Geary street car tracks he paused to let an automobile, which was traveling forty miles per hour, pass in front of him. Before he could proceed on his course the defendant's car approached from the left, swerved slightly to its left, hit the plaintiff, and knocked him down. No evidence was offered which would have authorized the trial court to apply the last clear chance doctrine. In the view we take of the case it will not be necessary to discuss anything but the defendant's last point.

[1-3] That point involves solely the question whether the case is controlled by the provisions of the Vehicle Code, St. 1935, p. 93, or by the provisions of paragraph 3 of section 10 of ordinance No. 7691 (new series) of the city and county of San Francisco. Over the objection of the plaintiff the trial court admitted said paragraph in evidence. Said paragraph is as follows: "It shall be unlawful for any person to be in any roadway other than in a safety zone or crosswalk, provided that this provision shall not be construed to prevent the necessary use of a roadway by a pedestrian." Under the facts it was not necessary for the plaintiff to use that portion of Geary street which he was attempting to cross. The rule applicable in determining whether a local ordinance or the general law is controlling is settled. In Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, at page 663, 262 P. 334, at page 336, the court said: "The effect of these several decisions is to declare that, whenever the state of California sees fit to adopt a general scheme for the regu-

lation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned." The question then arises "* * * what phases of the subject are covered by state legislation * * *" Many phases are so covered in chapter 10 of division IX of the Vehicle Code, secs. 560-564, St.1935, p. 188. The plaintiff contends that section 562 states the rule governing this action. That section is as follows: "562. (a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." The rule there declared does not prohibit a pedestrian from crossing in between intersections, but requires him to yield the right of way. Genola v. Barnett, Cal.Sup., 93 P.2d 109; Mitrovitch v. Graves, 25 Cal.App.2d 649, 78 P.2d 227. The crux of the instant case is the right of the plaintiff, at the time and place above mentioned, to cross Geary street. Clearly section 562, at least in part, deals with that subject. But it may not be said it deals with every phase thereof. The section of the ordinance is broader and more drastic. It not only imposes the duty on a pedestrian to yield the right of way at the place of the accident but it goes further and absolutely prohibits a pedestrian, except when necessary, from being in the place where the accident occurred. No authority has been cited to us that either directs or authorizes us to hold that the provisions of said ordinance which extend and make more drastic the statutory rule are invalid. They do not conflict with the statute. Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172. The added restriction is a phase not covered by the statute and the case does not fall within the rule stated in Atlas Mixed Mortar Co. v. City of Burbank, supra. That statement is fully supported by an examination of the facts and the conclusions of the courts in many of the decided cases. Mann v. Scott, 180 Cal. 550, 182 P. 281; Winsky v. De Mandel, 204 Cal. 107, 266 P. 534; Ex parte Snowden, 12 Cal.App. 521, 107 P. 724; Pemberton v. Arny, 42 Cal.App. 19, 183 P. 356; Ham v. County of Los Angeles, 46 Cal.App. 148, 189 P. 462; Humphrey v. U. S. Macaroni Co., 49 Cal.App. 395, 193 P. 609; Flynn v. Bledsoe Co., 92 Cal.App. 145, 267 P. 887; Borum v. Graham, 4 Cal.App.2d 331, 40 P.2d 866. The case last cited is particularly in point. Section 113 of the California Vehicle Act, St.1927, p. 1436, as it was worded at the time of the accident involved, required one operating an automobile to drive it at a careful and prudent speed. Section 5 of an ordinance of Pasadena provided for the marking of crosswalks. Section 8 of said ordinance prohibited vehicles from entering the space so marked when a pedestrian was crossing. The defendant made the same claim that this plaintiff now makes. On page 337, of 4 Cal.App.2d, 40 P.2d at page 869, the court said: "We are well satisfied that such cannot be said, for there is no conflict. Nothing in the legislative regulation is changed, and nothing is taken therefrom. The provisions of section 113 prescribe generally the exercise of a constant, careful, and prudent speed and maximum lawful speed at intersections. This in effect would require the operator of a vehicle to stop in an intersection if necessary to avoid danger to others lawfully using the highway. The ordinance in question made it obligatory to stop if a pedestrian were in such marked crosswalk on the same side of the street." We therefore hold that the provision of paragraph 3 of section 10 of ordinance No. 7691 (new series) of the city and county of San Francisco is applicable and controlling.

[4] That proposition being clear, it follows the plaintiff was guilty of contributory negligence as a matter of law which proximately contributed to the injuries complained of. In Meincke v. Oakland Garage, Inc., 11 Cal.2d 255, on page 256, 79 P.2d 91, on page 92, the court said: "These facts are clear: (1) That plaintiff was violating an ordinance designed to prevent the very character or type of injury which plaintiff received; (2) that the violation of this ordinance continued to the very moment of impact; and (3) that the injury would not have occurred if plaintiff had not been violating the ordinance. Under such circumstances there is no room for reasonable minds to differ and plaintiff's violation of the ordinance becomes a proximate cause of his injury as a matter of law (Hopkins v. Galland Mercantile Laundry Co., 218 Cal. 130, 21 P.2d 553; Cadwell v. Anschutz, 4 Cal.2d 709, 52 P.2d 916; Leek v. Western Union

Telegraph Co., 20 Cal.App.2d 374, 66 P.2d 1232), unless there are facts which bring the case within the last clear chance doctrine. (Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915.)" As above recited the facts did not involve the last clear chance doctrine, therefore the Meincke case is controlling.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

35 Cal.App.2d 264

WRIGHT et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 2445.

District Court of Appeal, Fourth District, California.

Oct. 23, 1939.

Hearing Denied Dec. 22, 1939.

1. Mortgages 🔑138

While grantor in ordinary trust deed securing debt retains interest in mortgaged realty, a different situation may exist where property is conveyed under certain trust provisions and for other purposes.

2. Trusts 🔑125

Under trust agreement, declaring that beneficiaries' interests were personal property and that they had no interests in lands conveyed by them to trustee as security for mortgage and other debts and advances and for purpose of holding, operating, leasing, selling and conveying properties, and providing for making of improvements thereon in furtherance of purpose of subdivision and sale, beneficiaries' entire interest in trust and trust property was personal property.

3. Judgment 🔑691

Trust beneficiaries, failing to present their claim of interest or equity in land, conveyed by them to trustee, in trustee's action to foreclose pledge of their beneficial interests in trust, together with trust property, were estopped to litigate such question in their subsequent ejectment action against trustee.

4. Deeds 🔑211(3)

In ejectment action, evidence that plaintiffs read their quitclaim deed, conveying land involved to defendant, and discussed it with three attorneys, who represented them and advised them to sign it, *held* sufficient, with other evidence, to sustain trial court's finding against them on issues of fraud in obtaining deed.

5. Mortgages 🔑294

A transaction by which mortgagor conveys his remaining equity in mortgaged property to mortgagee need only be fair and on consideration which is adequate under circumstances.

6. Appeal and error 🔑1008(1)
Mortgages 🔑294

What is adequate consideration for mortgagor's conveyance of his remaining equity in mortgaged property to mortgagee depends on particular circumstances and facts and is fact question for trial court in action wherein raised.

7. Mortgages 🔑294

Mortgagors' quitclaim deed of mortgaged realty, constituting part of trust corpus, to trustee in consideration of $300 cash, release of $4,500 indebtedness, and trustee's execution of contract desired by mortgagors with third party, over year after entry of judgment for trustee in its action to foreclose mortgagors' pledge of their beneficial interests in trust as security for payment of debt of about $220,000, which they were unable to pay for ten years, though they had full opportunity to sell property, was not void for lack of adequate consideration.

8. Mortgages 🔑294

Mortgagors, never offering to pay debt, secured by pledge of their interest in mortgaged property held in trust to trustee, or amount paid by trustee at foreclosure sale of pledged property, are estopped to assert title to property as against claim of trustee in possession thereof under mortgagors' quitclaim deed, absolute on its face, in ejectment action, wherein mortgagors sought to have deed set aside.

◆

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action in ejectment by S. B. Wright and another against the Security-First National Bank of Los Angeles. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Hearing denied; HOUSER and GIBSON, JJ., not participating.

Morris Lavine, of Los Angeles, for appellants.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action in ejectment involving the title and right of possession of about 1,100 acres of land in the San Bernardino mountains. Kate S. Wright having died pending the appeal, the administrator of her estate has been substituted as one of the appellants. For brevity, we will refer to the original appellants and to the respondent bank, although some of the earlier transactions involved were had with its predecessor, the Pacific Southwest Trust and Savings Bank.

Prior to June, 1924, the appellants owned the land in question subject to a $60,000 mortgage in favor of the respondent. They conveyed a one-third interest in this land to one A. J. Wheeler subject to this mortgage. Wheeler owned an adjoining tract of land known as the Heath ranch, which was also subject to a mortgage. In 1924, the appellants and Wheeler, in association with one James M. Oliver, entered into an arrangement to combine the Wright ranch and the Heath ranch, and any adjoining lands that might thereafter be acquired by any of the parties, for the purpose of developing a resort and land subdivision to be known as Wrightwood. To this end the appellants and Wheeler conveyed their respective lands to the respondent and, on June 2, 1924, a trust agreement was executed between the four parties above named, as beneficiaries, and the respondent as trustee and the respondent's banking department as payee.

This trust agreement is quite lengthy and only a portion thereof need be referred to. It recites that the above-mentioned properties have been conveyed to the respondent subject to the mortgages; that Oliver had performed certain services in connection with both of the properties; that the Wrights are entitled to 26/42nds, Wheeler to 10/42nds, and Oliver to 6/42nds, "interest in the trusts and benefits herein and hereby created"; that the beneficiaries will from time to time borrow further amounts from the payee; that the beneficiaries have mutually agreed that it is for the best interests of all concerned that both properties and any adjoining properties subsequently acquired should be owned, operated, improved and disposed of as one property; that in order to carry out this purpose "to thus combine ownership of all the aforesaid properties * * * and to own, operate and dispose of same as one property" it is agreed that any adjoining property thereafter acquired by any of the beneficiaries shall be conveyed to the trustee; that the trustee paid no consideration for the lands conveyed and to be conveyed; that the conveyances made and to be made were and will be received by the trustee primarily as security for the payment of the Wright mortgage and subsequent advances and for the further "purpose of holding, operating, leasing, selling and conveying said properties", and applying and disposing of the proceeds therefrom, in accordance with the terms of the trust.

The trust agreement then contains twenty-five articles setting forth further agreements of the parties. Among other things, the beneficiaries agree to pay all existing and future encumbrances, all taxes, liens and expenses, and pay for all improvements contracted for or ordered by them. If any improvements promised by the beneficiaries to purchasers of lots are not installed or paid for, the trustee is authorized to install and pay for the same and be reimbursed therefor. The beneficiaries are authorized, with the approval of the trustee, to subdivide any portion of the land and the trustee is to subscribe necessary maps and dedicate to public use appropriate streets and alleys and to make conveyance to purchasers of any lots sold when they are entitled thereto. The trustee is to rent, lease, sell or convey the property or any portion thereof to such persons and at such prices and terms as the beneficiaries or their agent may direct, subject to the approval of the trustee. The agreement recites that the beneficiaries have entered into a written agreement with a sales agent for the subdivision of the first unit of the property and the trustee is to execute contracts of sale upon demand of said agent. Provision is made for further agency contracts in connection with the subdivision of further units of the property. The trustee is to receive and collect all proceeds arising from leases and sales of the trust property and dispose of them in a designated manner. In the event the interest of any beneficiary is assigned or passes by reason of his death the trustee shall hold said interest for and shall distribute the proceeds to the one entitled thereto. Article XX of the trust agreement contains the following:

> "It is distinctly understood that the interest under this trust of each beneficiary hereunder is personal property and that no such beneficiary has any right, title or interest in or to the property covered hereby, and has no right or power to in any manner apply for or secure the dissolution or termination of this trust, or the partition or the division of any of the trust property; the sole right and power of each beneficiary hereunder being to enforce the performance of the terms of this trust, as expressly set forth in this declaration of trust.
>
> "Provided, however, that after the payment in full of the indebtedness secured hereby, if any, and the termination of the agency appointment or appointments, if any, made in accordance with the terms of this trust, the beneficiaries of this trust by a written direction of a majority in number (and not in interest), may close and terminate this trust."

The original mortgage for $60,000 given by the appellants to the respondent was subsequently paid and released. As contemplated by the trust agreement and in connection with the development of Wrightwood, the respondent advanced large sums of money to the beneficiaries. In 1928 these advances amounted to $197,331.23 and the four beneficiaries executed a note for that amount to the respondent, which note recited that each beneficiary pledged to the respondent as collateral security for the payment of the note "all my right, title and interest in and to" this declaration of trust "and also all my right, title and interest in and to the proceeds and avails thereof". The note also provided that the respondent might sell the pledged property at public or private sale, as it might see fit. In the next few years the four beneficiaries executed seven other notes in various amounts, containing the same provisions. The principal of these notes totalled $263,331.23. Certain amounts were paid thereon, so that in 1934 the total indebtedness amounted to approximately $220,000.

On March 15, 1934, the respondent brought an action in the superior court of Los Angeles county against the appellants, the other signers of these notes, and certain subsequent pledgees of the beneficial interests in the trust. The complaint was labeled "Action to Foreclose a Pledge". Among other things, the complaint alleged that the signers of the various notes had pledged their "entire beneficial interest" in and to the trust here in question as security for the payment of the notes and that the notes provided that said pledge was made upon the agreement that in the event the indebtedness was not paid as agreed the respondent should have the right to sell the pledged beneficial interests in this trust "as personal property". Among other things, it was prayed that each of the defendants be foreclosed of all "right, interest, claim, lien and/or equity in or to the pledged property, to-wit, the beneficial interest in and to" the declaration of trust here in question "together with the property therein described". It was then prayed that the pledged property be sold in the manner provided by law for the sale of pledged personal property in a court action. The appellants were served and filed an appearance in that action but filed no answer. The court found, among other things, that the entire beneficial interest in this trust "is personal property and it was duly pledged as personal property to secure the respective indebtedness of the defendants". Judgment was entered for approximately $221,000 and a commissioner was appointed to sell all of the property mentioned in the complaint in the manner provided for the sale of pledged personal property. The commissioner reported to the court that he had sold the property to the respondent for about $217,000 and that the balance still due and owing on the judgment was $4,500.

The appellants in this action filed notice of appeal from the judgment and decree in the Los Angeles action. Subsequently, the appellants and respondent in this action entered into a written agreement whereby the respondent agreed to pay to the appellants the sum of $300 and to release the appellants from any and all claims and demands it had against them, and the appellants agreed in consideration thereof and of "other good and valuable consideration" to release and discharge the respondent "from any and all claims, and demands of any nature or kind", to dismiss their appeal in the Los Angeles action, to "waive any and all claim in and to any property, real and personal, a part of the corpus" of the trust here in question and "also do hereby transfer and convey, remise, release and forever quitclaim unto" the respondent "all of their right, title and interest, if any, in and to the said property, and in and to any reservations, conditions, easements, rights of way or other interest in anywise affecting the title or possession of said property". The agreement then proceeds: "It is the intention of the parties of the first part to quitclaim, and they do hereby quitclaim to said second party, any and all of their right, title and interest, if any, in and to the property, a part of the corpus of" the trust here in question. After the execution of this agreement the appeal in the Los Angeles action was dismissed, the respondent entered into possession of the land and the respondent paid the $300 to the appellants and also executed a contract to a third party for another purpose, the appellants having been trying to assist said third party in obtaining such a contract.

About a year and a half later the appellants brought this action in ejectment. The complaint alleged that at all times since June 2, 1924, the appellants have been "seized in fee of said real property", and that they were in possession until June 1, 1934, at which time the respondent wilfully and unlawfully entered upon the property and ousted and ejected them. An amended complaint in ejectment was filed alleging the same things and containing a second cause of action in which it was alleged that the above-mentioned agreement, by the terms of which the appellants agreed to dismiss the appeal in the Los Angeles action and to quitclaim to the respondent the lands included in the corpus of the trust, was obtained by fraud and misrepresentations and that the appellants intended thereby to agree to dismiss the other action but did not intend to quitclaim their interest in the lands conveyed in trust and did not know that such a quitclaim provision was included therein. The respondent answered, denying the allegations of the amended complaint and setting up various defenses, among which were that the action was barred and the appellants estopped by the final judgment in the Los Angeles action and by the quitclaim provisions of the agreement, and that the appellants were estopped by their grant deed, the declaration of trust and the assignment and pledge of their entire beneficial interests in the trust. The court found in all respects in favor of the respondent, finding upon ample evidence that there had been no fraud or misrepresentation in connection with the execution of the settlement agreement through which the appeal in the former action was dismissed and the property quitclaimed to the respondent. It was further found that under the trust agreement the beneficial interest of each beneficiary was personal property and that no beneficiary had any right, title or interest in and to the property conveyed in trust; that the appellants had pledged their entire beneficial interests in the trust as well as in the proceeds and avails thereof as a pledge of personal property; that the property so pledged was sold pursuant to the decree in the Los Angeles action, by virtue of which the respondent became the owner of all of the real property; that at no time since said sale had the appellants offered to pay the amount due or to do equity; that the appellants had executed an agreement quitclaiming and conveying to the respondent any and all interest they might have in and to the property; that at the time said agreement was executed the said appellants were represented by three attorneys, each of whom advised them to execute the agreement; that by reason of the judgment entered in the Los Angeles action the appellants are barred and estopped from maintaining this action; that the compromise agreement and quitclaim is in full force and effect, has never been rescinded and was not obtained by any fraud whatever; and that by reason of said quitclaim the appellants are barred and estopped from maintaining this action. A judgment was entered in favor of the respondent and this appeal followed.

The appellants contend that the conveyance of this property in trust to the respondent was an equitable mortgage, relying upon Sacramento Bank v. Alcorn, 121 Cal. 379, 53 P. 813. In that case, it was pointed out that where the effort to create a trust failed it would seem to follow that the instrument was a mortgage. It is next argued that since this was a mortgage the appellants, as mortgagors, have the right of possession until that right is divested as provided for in the case of real property, citing Bank of Italy Nat. Trust & Savings Ass'n v. Bentley, 217 Cal. 644, 20 P. 2d 940, which case involved an ordinary trust deed. It is then contended that the appellants, as trustors, occupied the dual position of beneficiaries under the trust and of mortgagors under an equitable mortgage, that these two interests were entirely separate and distinct, and that their interest as mortgagors was unaffected by their pledge and assignment of their beneficial interest in the trust, by the subsequent sale under that pledge, and by the judgment in the other action. In this connection it is argued that the appellants believed, and had a right to believe, that by the foreclosure and sale of their beneficial interest in the trust "they would be protected in their ownership of the real estate which they had deeded to the bank as a security; that the notes to secure which the deeds were made would be paid and satisfied; that their property would revert to them free and clear". It is further contended that the right of possession of the real property was not involved in the Los Angeles action, that the judgment therein has no effect in this action, and that the quitclaim given to the respondent is null and void because the respondent failed to prove that it paid the appellants the full value of their equity.

[1] The first question naturally suggested is whether the interest of the appellants, as trustors, in the real property thus conveyed in trust was personal property or whether they retained an interest in real property which could only be divested as such. While it is well settled that the grantor in an ordinary trust deed given to secure a debt retains an interest in the real property it is also well recognized that a different situation may exist where property is conveyed under certain trust provisions and for other purposes. It has been held that whether such trust property is to be considered as personalty or as an interest in real estate depends upon the intention of the parties and, in various cases, certain things have been held sufficient evidence of an intention to convert an interest in real property into one in personal property.

[2] The appellants argue that Janes v. Throckmorton, 57 Cal. 368; Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 218 P. 14, and Lynch v. Cunningham, 131 Cal. App. 164, 21 P.2d 154, 973, are controlling in the instant case upon this question. In the Janes case land was conveyed to another in trust with directions to sell within three years enough of the land to pay the grantor's debts and then to reconvey to him a part of the remainder. The court pointed out that it was manifestly the hope and intention of the grantor to pay the debts by selling a part of the land and to retain the remainder, and held that he retained an interest in the land. In the Duffill case it was held that a trust created by a certain will gave a present rather than a future interest in real property to a beneficiary. The trust was to continue until a certain person reached, or would have reached if he had lived, the age of 21 years. In the Lynch case the property was conveyed to a trustee to manage and pay over the income to the beneficiaries for a period of 20 years, the property then to be reconveyed.

The respondent relies on Ward v. Waterman, 85 Cal. 488, 24 P. 930; Craven v. Dominguez Estate Co., 72 Cal.App. 713, 237 P. 821; Finnie v. Smith, 83 Cal.App. 707, 257 P. 866; Houghton v. Pacific Southwest Trust & Savings Bk., 111 Cal. App. 509, 295 P. 1079; Smith v. Bank of America, etc., Ass'n, 14 Cal.App.2d 78, 57 P.2d 1363; Bank of America Nat. Trust & Savings Ass'n v. Sparr Realty Corp., 20 Cal.App.2d 10, 66 P.2d 476, 479. These cases all involve subdivision and sale trusts and in each case it was held that the grantor had retained no interest in the real property but as beneficiary owned merely an interest in the proceeds from the sale of the property, which interest was to be considered as one in personal property.

The appellants argue that the cases last cited constitute the only exception to the rules established by the cases relied upon by them and that the subdivision trust cases establish the rule that in order to change an interest in land conveyed to such a trust into an interest in personal property it must be mandatory, under the trust agreement, for the trustee to sell all of the real property in any event, and there must be no power of termination of the trust or contingency upon which any part of the land may be returned to the grantor. Some of these cases contain language tending to support this contention. For example, in Bank of America Nat. Trust & Savings Ass'n v. Sparr Realty Corp., supra, it is said: "In both the Cunningham and the Duffill Cases the reconveyance of the corpus appeared to be within the contemplation of the parties involved in the transaction. In the case at bar that intention appears to us to be entirely absent. Not a single one of the trusts indicates any contemplation that the real property should ever be returned or reconveyed to the beneficiary; that the interests of the beneficiary consisted solely in whatever the surplus might be." However, the court had just pointed out that in both of those cases the rights of third parties were being considered and not merely the intention of the parties to the trust. The appellants' statement that not one of the above cited subdivision cases involved a trust agreement which permitted any part of the land to be returned to the trustor is not quite true. In Smith v. Bank of America, etc., Ass'n, supra, the trust agreement provided that the trust might be closed by the conveyance of any unsold portions of the property to the beneficiaries, but it further provided that the interest of each beneficiary was personal property and not an interest in the property conveyed to the trust. Although the interest of a creditor was being considered, it was held that the beneficiaries had no interest in the real property. In that case, the court said [14 Cal.App.2d 78, 57 P.2d 1367]: "Appellant goes to some length to differentiate between the 'title' to the property and the 'estate' in the property. In this regard one must differentiate between a trust established for a perfunctory purpose only and one established with authority in the trustee to alienate the estate and vest title." And, also, "In arriving at a solution of abstract questions and in following the devious courses taken by the title to property involved in various transactions, we, however, sometimes lose sight of the full intention of the parties to these transactions. The primary rule in the construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the creator."

The cases above referred to involve the rights of creditors or third parties. Under such circumstances these cases may be taken as holding that where a trust is created for a limited period or a limited purpose, the grantor retains an interest in the realty conveyed, that a contrary rule may prevail where land is conveyed in trust for the purpose of subdivision and sale, and that in such a case the absence of a power of revocation and of any provision for returning the land to the grantor is sufficient evidence of an intention to change the interest of a beneficiary from one in real property to one in personal property.

A somewhat different question is here presented where land was conveyed in trust not only as security for a past debt and for contemplated advances in aid of a subdivision scheme, but also to the end that several properties might be owned, improved, subdivided and disposed of as one, and where the controversy is between the trustors and the trustee and the rights and interests of third parties are not involved.

This trust agreement specifically provides that the interest of each beneficiary is personal property and that no such beneficiary has any right, title or interest in or to the property conveyed. While this seems to have been intended to cover the entire interest of each beneficiary the appellants contend that it did not cover their interest as mortgagors since the conveyance in trust was made partly as security for debts. While the trust agreement recites that the conveyances were made primarily as security for debts and advances and for the further purpose of holding, operating, leasing, selling and conveying the properties, the appellants largely ignore the latter purpose in contending that the trust agreement should be interpreted as creating an equitable mortgage. The trust agreement provides for the making of improvements in furtherance of the purpose of subdivision and sale and contemplates advancements from the respondent, apparently for that purpose. Such advancements were made until the debt amounted to some $263,000. It is fully apparent that this was quite different from the ordinary conveyance given to secure a debt. Renton v. Gibson, 148 Cal. 650, 84 P. 186; Cardoza v. White, 219 Cal. 474, 27 P.2d 639, 640. In the latter case the court said: "But the authorities cited * * * go no further than to state the familiar proposition that a deed made solely for security will, when attacked by the grantor, be construed as a mortgage in accordance with the real intent of the parties." The improvement and sale of this land and the securing of advancements to aid therein was one of the main purposes, if not the main purpose, of this trust. An existing contract with a subdivider was recognized and it provided that other such contracts might be made. The only material difference between this trust agreement and those considered in the subdivision cases above noted is that it was here provided that the trust might be terminated after all debts had been paid and all subdivision contracts had been ended, in which event any unsold land would be returned to the beneficiaries, and not to the grantors. In a somewhat similar situation, even where the rights of third parties were involved, the court, in Smith v. Bank of America, etc., Ass'n, supra, held that the beneficial interest of the trustors was personal property and said: "It is made quite clear from the trust agreement itself that during the life of the trust the entire title and estate is in the trustee."

Not only are the rights of third parties not involved here but the parties have clearly expressed the intention that the trustors shall have no right, title or interest in the property conveyed and that their interests under the trust shall be considered as personal property. In Smith v. Bank of America, etc., Ass'n, supra, it is said that such language is indicative of the intention of the parties and that "the intention is the criterion". In Faires v. Title Ins., etc., Co., 15 Cal.App.2d 350, 59 P.2d 428, 431, this court said: "The declaration of trust contained the provision that the interest of the beneficiaries should be personal and not real property. * * * It is probably true that this effected the conversion of an interest in real estate into personal property." In Bank of America Nat. Trust & Savings Ass'n v. Sparr Realty Corp., supra, in holding that the beneficial interests in the trust were personal property the court, after pointing out that the language of the trust agreement and of the assignments of beneficial interests disclosed such an intention, said: "If the intention of the parties was to treat the beneficial interests as a pledge in the nature of personal property, then and in that event the intention then and there expressed prevails throughout the entire transaction."

That the expressed intention was the real intention of the parties seems more probable since different lands were conveyed to the trust by three of the trustors with the purpose of holding and disposing of them as a unit, and there was not only a fourth beneficiary but the interests of the beneficiaries differed materially from their respective interests in the lands conveyed. In no event would any beneficiary receive back exactly what he had conveyed with deductions for what had been sold.

The subsequent acts of the parties throw further light upon their intention and confirm what seems to have been rather clearly expressed in the trust agreement. To secure notes subsequently given in pursuance of the general plan, the trustors each pledged to the respondent all their interest both in the trust and in the proceeds thereof. They had each agreed that their entire interest in the trust and the corpus thereof was personal property, and they again pledged these interests as personal property. This subsequent pledge confirms their previous expressed intention that, at least as between themselves, their interests were to be treated as personal property. The subsequent assignments and pledges referred not only to their interest in the trust but made a separate reference to their interest in the proceeds and avails thereof. All of their pledges referred to their entire interests in the trust and it is a mere technicality and a play on words to argue that they intended, by the language thus used, to cover merely their interests in the proceeds and to omit and exclude any equitable interest in the corpus of the trust estate. Under these circumstances and as between the parties themselves, we think the court was justified in finding that the appellants' entire interest in this trust and in the property constituting the corpus thereof was personal property. We find nothing in the cases or statutes cited which would prevent that conclusion under the facts here found.

[3] Aside from the meaning of the provisions of the trust agreement and of the pledges of the beneficial interest therein the question of whether the appellants still possess an interest in the real property is affected by further considerations, including the effect of the judgment rendered in the Los Angeles county action and of the subsequent quitclaim executed by them.

The appellants contend that that judgment is not material here, although all parties here were parties to that action. It is argued that the only issue here is as to the right of possession of the land and that this issue was in no way involved in the former action. However, the question of title is involved here as any rights of the appellants must depend upon whether or not they still have an interest in this land which has not been foreclosed. Whether they retained such an interest depends not only upon a construction of the trust agreement, but upon a construction of the pledge of their beneficial interest therein. In Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387, 390, the court quotes with approval from Freeman on Judgments as follows: "If the existence, validity or construction of a contract, lease, conveyance or other obligation has been adjudicated in one action it is res judicata when it comes again in issue in another action between the same parties, though the immediate subject-matter of the two actions be different." The court then said:

"In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto. This rule has been aptly stated as follows: 'It is important to note in this connection, however, that even though the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, the estoppel so far as that right, title or issue is concerned must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made.' Freeman on Judgments (5th Ed.) § 677, p. 1432. To the same effect see Sullivan v. Triunfo Gold, etc., Min. Co., 39 Cal. 459. Numerous California cases may be found where this rule has been applied.

"This principle also operates to demand of a defendant that all his defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them."

Instead of proceeding with an ordinary sale of the pledged property the respondent brought the former action. The pledge agreement had referred not merely to the interest of the trustors and pledgors in the proceeds of the trust, but also to all their right, title and interest in and to the trust itself. The complaint in the former action alleged that the entire interest of the pledgors under the trust agreement had been pledged with the right to sell the same as personal property. Among other things, it was prayed that each of the defendants be foreclosed of all his right, interest, claim, lien and/or equity in and to the beneficial interest in this trust, "together with the property therein described". The appellants were thus advised that a foreclosure of any interest or equity they might have in the property was demanded. They failed to answer and the court found that their entire beneficial interest was pledged as personal property. That the appellants fully understood that the purpose of the other action was to foreclose any possible interest they might have in the real property in question is shown by an affidavit filed by the appellant S. B. Wright in the Los Angeles action in connection with a motion to reopen the same. In this affidavit, he said: "Affiant verily states that the object and purpose of said action was to foreclose affiant's interest and the interest of the other named defendants of all their right, title and interest in said real property known as Wrightwood." There was presented in that action the question of whether the entire beneficial interest of the appellants in this trust was or was not personal property and pledged as such, and it was further sought to foreclose all of the appellants' interest in this land. The appellants, at least, had no doubt as to what was meant by the reference in the complaint to their entire beneficial interest. If they considered that they had an interest or equity in the land which had not been pledged they then had an opportunity to present such a claim. Under established rules they should be estopped from again litigating that question, and the trial court so found.

[4] Subsequently, the appellants dismissed their appeal in the former action and quitclaimed the land in question to the respondent. At the trial of the present action the appellants contended that this quitclaim was obtained from them by fraudulent representations made by the respondent, that they did not know what was in the instrument, and that they had no independent advice. The court found against them on the issues of fraud on ample evidence, which included evidence that they had read the document and had discussed it with three attorneys who then represented them and who had advised them to sign it. They now contend that the quitclaim was void because they were mortgagors under an equitable mortgage and because, as they say, the respondent failed to prove that it paid, as consideration for the quitclaim, the full value of their equity in the property. The quitclaim was signed on April 30, 1935, about a year after judgment was rendered in the Los Angeles county action. Mrs. Wright testified that she considered the property to have been then worth $500,000, and appellants state that this testimony was not denied. It does appear, however, that this testimony came in incidentally and that the case was tried on the theory that the quitclaim was void, not because of inadequate consideration, but because it was obtained by fraud and the appellants were deceived as to its contents. On April 10, 1934, the appellant S. B. Wright wrote to the respondent, "Perhaps I should say here that it has been a great relief to me that the Bank brought this action as I believe it was absolutely essential that they should do so to protect itself and all other parties in interest. The Bank has always extended to us every possible accommodation consistent with good bank-

ing and for which, of course, we are duly appreciative." More than a year later the property was quitclaimed to the respondent. The quitclaim agreement recites a consideration of $300, which was paid, and "other good and valuable consideration". While we are not informed exactly as to what that other consideration was, it does appear that the respondent released the appellants from the payment of the balance of $4,500 on the judgment on the notes, and also executed a contract to a third person which the appellants were anxious to obtain.

[5-7] In support of their contention that a fiduciary relationship existed between the parties at the time the quitclaim was signed and that the burden rested upon the respondent to affirmatively prove that it had paid for the mortgagor's equity "what it was worth", the appellants rely upon Bradbury v. Davenport, 114 Cal. 593, 46 P. 1062, 55 Am.St.Rep. 92; Clarke v. Fast, 128 Cal. 422, 61 P. 72; and Collette v. Sarrasin, 69 Cal.App. 114, 230 P. 464. In the Bradbury case, the complaint alleged that a deed had been placed in escrow to be delivered if a mortgage was not paid within a certain time and it was sought to have the deed construed as an equitable mortgage. A demurrer to the complaint was sustained and on appeal the judgment was reversed on the ground that a sufficient cause of action had been alleged. In a subsequent appeal (Bradbury v. Davenport, 120 Cal. 152, 52 P. 301, 302), the validity of the deed was sustained upon the findings. In that case, the court quoted from Watson v. Edwards, 105 Cal. 70, 38 P. 527, as follows: "A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses, and with their eyes open, could not make such a contract." Clarke v. Fast involved the transfer of an insurance policy for $5,000 in payment of a debt of $200 under circumstances which were plainly inequitable. In Collette v. Sarrasin, supra, the court assumed that in the case of a deed made by a mortgagor to his mortgagee it must be shown that the conduct of the mortgagee was fair and that he paid what the property was worth, but refused to go into that phase of the case because it held that the deed there in question was a deed of gift.

While it may be admitted that an adequate consideration must be paid in such a case, what is an adequate consideration must depend upon the particular circumstances involved, as is indicated in some of the other cases in this state. In De Martin v. Phelan, 115 Cal. 538, 47 P. 356, 56 Am.St.Rep. 115, the complaint alleged that land worth $390,375 was mortgaged for $196,000, that plaintiff's equity was worth at least $45,500, that the defendant took advantage of the plaintiff's necessities and offered her $19,000 for her equity of redemption, which she took but would not have taken had he not concealed from her the fact that he was willing to pay her up to $45,500 if he could not procure the conveyance for less. The court held that the complaint did not state a cause of action and held that there was no fiduciary relationship between the parties at that time, saying the defendant had obtained a decree of foreclosure and had postponed the sale pending the negotiations. The court pointed out that the plaintiff was fully aware of the situation and knew all of the essential facts. In Heney v. Heney, 80 Cal.App. 301, 251 P. 841, 848, it is said: "The rule adhered to in this state is, however, that 'the relation between a mortgagee and mortgagor is not fiduciary'." In Graves v. Arizona Central Bank, 205 Cal. 715, 272 P. 1063, 1065, the respondent had loaned to one Squier $1,500 and taken as security an assignment of a contract under which Squier was buying certain land at a purchase price of $12,000 and upon which $4,000 had been paid. Squier later orally agreed that the assignment should be absolute and the respondent paid $2,000 on the original contract. In speaking of the consideration for the oral transfer the court noted that the respondent had canceled Squier's debt to him, had assumed the further payments on the contract and had prejudiced himself by making such payments, and then said: "Sufficient facts therefore appear to estop said Squier from asserting any title to said property, equitable or otherwise, as against the claim of respondent." In Tetenman v. Epstein, 66 Cal. App. 745, 226 P. 966, 970, the court, after stating that the findings negatived the idea that the deed was executed as a result of fraud and that it was expressly found that the parties at the time of the transfer believed the property to be worth no more than the debt, said:

"The conclusion is unavoidable from these findings that when the deed was executed the interveners were satisfied to secure the cancellation of their debt in that way. Such being the facts, the underlying reason for the rule favoring the mortgagor's right to redeem has no application if the mortgagor contracted freely; no substantial argument is apparent for limiting his power to contract and relieve himself of a debt through the transfer of a property right.

"But aside from these considerations it will be noted that the actions cited by respondent, and other cases in which courts of equity have shown a willingness to set aside deeds made by mortgagors conveying their equities of redemption to mortgagees, have been suits to rescind or to redeem; proceedings in which the mortgagor, though tardy, has either come forward and tendered the amount necessary for redemption, or has sought rescission on the ground of fraud or undue influence or advantage taken by the mortgagee over the mortgagor."

Assuming, but not holding, that a relationship of mortgagor and mortgagee existed here, the rule relied upon by the appellants requires no more than that the transaction by which the mortgagor conveys any remaining equity he may have in the property to the mortgagee shall be fair and upon a consideration which is adequate under the circumstances. What is an adequate consideration must depend upon the facts in each case and is a question of fact for the trial court. The respondent here gave a very substantial consideration for the quitclaim, including $300 in cash, the release of $4,500 further indebtedness, and the execution of a contract which the appellants desired. While the appellants may, in looking back, have considered the property worth $500,000 at the time in question, the general circumstances justified the court in concluding otherwise. With full opportunity to sell the property the appellants had been unable to pay the debt while the respondent carried the loan for ten years. The quitclaim was given more than a year after judgment was entered in the other action. When the cash called for by that agreement was paid on May 14, 1935, after the appeal had been dismissed, the respondent told Mr. Wright that it would sell the property to him, or to anyone, for what it had in it. This action was begun nineteen months later, and there is no evidence that in the meantime, or since, the appellants or anyone in their behalf, have ever offered to pay that amount and take back the property. Under the circumstances shown by the evidence we are unable to see that the court erred in refusing to declare the quitclaim void for lack of an adequate consideration.

[8] We think the court correctly held that the appellants are estopped from asserting any title to the property, equitable or otherwise, as against the claim of the respondent. It is noticeable that they have never offered to pay the amount of the debt or the amount paid by the respondent at the sale of the pledged property. While the appellants assert that such an offer on their part is not required in this action, being one merely for the possession of the property, the facts remain that the question of the title to the land was actually involved, that the respondent was in possession under a conveyance absolute upon its face, and that in order to recover possession the appellants necessarily sought to obtain equitable relief by having the quitclaim set aside. To secure such relief it was incumbent upon them to comply with and bring themselves within the rules of equity.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

14 Cal.2d 541

PEOPLE v. SMITH.

Cr. 4235.

Supreme Court of California.

Oct. 30, 1939.

1. Homicide ⚿28

Intoxication voluntarily brought about by defendant was no excuse for murder.

2. Homicide ⚿270

In murder prosecution, evidence of defendant's intoxication was properly presented for jury's consideration in determining whether defendant had intent to commit murder. Pen.Code, § 22.

3. Homicide ⚿315

Belief that defendant was not so intoxicated as to prevent him from having specific intent to kill was implicit in verdict of guilty of murder in the first degree, returned after jury had been instructed on the law governing defendant's conduct under the circumstances. Pen.Code, § 22.

4. Homicide ⚿237

Evidence of killing committed some time after deceased had struck defendant on the face *held* to authorize conviction of first-degree murder, notwithstanding some evidence concerning defendant's abnormal mental condition.

5. Criminal law ⚿474

Defendant's testimony at insanity hearing before murder trial, that he resented refusal of deceased to pay him more wages, was inadequate as basis for any opinion of legal insanity.

6. Homicide ⚿319

New evidence, consisting of testimony of deputy sheriff and alienists appointed by the court who had testified on the issue of insanity, that defendant was intoxicated and did not act with premeditation because of intoxication, was not ground for new trial where only excuse for not calling such witnesses earlier was that one witness refused to give statement of his findings before trial.

HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Lloyd W. Smith was convicted of murder in the first degree, and he appeals.

Affirmed.

James F. Gaffney, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and F. Walter French, Deputy Atty. Gen., for the People.

EDMONDS, Justice.

The proceedings which resulted in a judgment imposing the death penalty upon conviction of the crime of murder in the first degree are presented for review under section 1239 of the Penal Code, which provides for an automatic appeal in such cases.

After pleas of not guilty and not guilty by reason of insanity, the defendant was tried by the court, sitting with a jury, and found guilty in a verdict which included no provision concerning the punishment to be imposed therefor. A trial upon the issue of insanity followed and resulted in a verdict by the same jury finding that at the time of the homicide the defendant was sane. After a motion for a new trial had been made and denied, judgment was imposed.

Grover Russi, the victim of the homicide, with his wife, their two children, and William Johnson, Mrs. Russi's brother, lived on a ranch near Sacramento. About seven years before, Mr. Russi took the defendant from an old men's home and since that time had given him board, lodging and small sums of money for doing chores on the farm. According to the testimony offered by the prosecution, the crime was committed after a dispute over a trivial matter at the breakfast table. The defendant became angry and jumped up from his seat but Mr. Russi "sat him back in the chair". Within a few minutes the defendant went out to bring in some firewood for the kitchen range. Shortly thereafter Mrs. Russi left the farm to take her son to school, and Mr. Johnson started for another ranch.

Soon Joyce Russi, the daughter, who was in her bedroom, heard blows and ran to the kitchen. She testified that the defendant was beating her father, who was at that time prone on the floor, with two pieces of firewood. When she attempted to help her father she was struck several times by Smith, who muttered, "You son of a gun, I will get you too." Her screams and the sound of blows were heard by Mr. Johnson, who immediately ran into the house and disarmed the defendant. Mr. Russi died as a result of two deep wounds on the back of his head.

No brief has been filed on behalf of the defendant, but the contentions advanced by him upon the trial and the affidavits relied on in support of his motion for a new trial will be considered and passed on.

[1-3] As a defense to the charge against him, the defendant testified that he had been drinking and because of his intoxication he did not have the requisite intent to commit the crime of murder in the first degree. Although it appears that he may have been in this condition, it was a state voluntarily brought about, and, therefore was no excuse for the crime. However, the evidence concerning the defendant's intoxication was properly presented to the jury for its consideration in determining whether he had the intent to commit the act charged against him. Sec. 22, Pen. Code. That the jurors believed that he was not so intoxicated as to prevent him from having a specific intent to kill his employer, is implicit in the verdict, returned after they had been instructed as to the law governing his conduct under such circumstances.

[4] At the time of his trial, the defendant testified that he had little recollection of the events which occurred when Mr. Russi was killed. However, he remembered that Mr. Russi struck him on the face during breakfast. Mrs. Russi, her son and her brother each denied that any such thing occurred, but even if the defendant's statement is true, there is no showing that the killing was done in the heat of passion following the blow. On the contrary, he testified that he left the kitchen two to five minutes after Mr. Russi attacked him and it was ten or fifteen minutes later when he returned with the wood. Under these circumstances, the jury was justified in finding the defendant guilty of murder in the first degree. People v. Golsh, 63 Cal.App. 609, 219 p. 456.

The jury was instructed that it might find the defendant guilty of murder in the first or the second degree, or of manslaughter or not guilty and the different crimes were defined. Other instructions fully and fairly stated all of the law applicable to the issues raised by the information and the defendant's pleas.

[5] At the insanity hearing the defendant testified that he resented the refusal of deceased to pay him more wages in addition to his board, lodging, clothing and spending money. This testimony was inadequate as a basis for any opinion of legal insanity. No expert or lay opinion that appellant was insane was expressed.

Each of two experts appointed by the court examined appellant prior to the trial. Dr. Margaret Smythe testified, "I think he was sane." On cross-examination the most favorable admission which she made in appellant's behalf was to the effect that she did not "think the man would ever do such a deed unless he had been drinking. * * *" This she qualified with the statement "* * * but I think he is a sane man".

Dr. Bert F. Howard expressed the same opinion, saying "I thought he was sane." On cross-examination he was asked whether brooding over fancied wrongs would have led to confusion in the defendant's mind. The doctor replied, "That would be merely a directing cause; I think it must have been—he was very emotional and alcohol releases these inhibitions, and as soon as the inhibitions were released he boiled over, as it were."

No effort was made to show any ancestral history of insanity. The only medical history disclosed at the insanity hearing was that appellant had contracted syphilis in 1906, which caused hardening of the arteries. This condition was considered by the doctors as a cause for the appearance of premature old age in appellant, but it does not appear that any mental deterioration existed by reason of the syphilitic history.

[6] In support of a motion for a new trial, the defendant's counsel presented his affidavit stating he had discovered new and important evidence which he had not known of before. This evidence was stated to be the testimony of the two alienists who were appointed by the court and appeared as witnesses at the trial upon the issue of insanity, and a deputy sheriff. According to the affidavit, each of the physicians would testify that because of the defendant's intoxication he did not act with premeditation. The other witness, it was said, would testify that immediately after the homicide the defendant was in an intoxicated condition.

No excuse was offered for not calling these witnesses except that one of the physicians refused to give a statement of his findings prior to the trial. However, the court appointed the two physicians as alienists at the time the defendant was arraigned and the deputy sheriff is the officer who arrested him. Under these circumstances, and considering the testimony which, it was asserted, each would give, the motion was properly denied.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; KNIGHT, J. pro tem.; SPENCE, J. pro tem.

HOUSER, Justice.

I dissent. From a careful reading of the reporter's transcript of the proceedings herein. I am convinced that the record discloses no prejudicial error. But from the conceded fact that, at the moment when the homicide was committed, defendant was under the influence of intoxicating liquor, it is doubtful that he was capable of forming an express or specific intent to commit a crime, or of appreciating the difference "between right and wrong". To some extent, the circumstances indicate a "sudden brainstorm". One of the alienists testified as follows:

"I made a physical examination with reference to his reflexes to see if they showed any present signs of syphilis; there were no neurotic signs of syphilis,—and, I continued the examination,—the medical condition showed no dementia of the type which you would expect to find following after a long duration, and I didn't find any sign of that. I think the story he gave me was very revealing, it showed a keen mind, and I believe he was telling the truth; I think that he was very much confused at the time, that there was certain events of the morning which he had forgotten entirely,—I don't think he remembered the facts exactly; I think, as he told me his story, he acted in intense anger, under a reaction, an emotional reaction of anger, so certain events which preceded the act, I think the anger perhaps played as much part in his forgetting as the alcohol; but he related as to the amount of alcohol he had taken. I think, considering his age and with hardening of the arteries probably including syphilis in his system, caused the arterial hardening, and that he was more susceptible to the alcohol than he would otherwise have been, and that he was definitely confused and reacted emotionally and almost instinctively in entering into this fight. I think it was, as far as this act I am considering is concerned, it was an unpremeditated fight. * * * He was very emotional and alcohol releases these inhibitions, and as soon as the inhibitions were released he boiled over, as it were. * * * A. I am rather inclined to think he thought he was doing right. Q. But could he distinguish between what was right and what was wrong? A. I think he had power of analysis, but his emotions overcame his inhibitions." And in that connection, the other alienist testified that:

"* * * I don't think the man would ever do such a deed unless he had been drinking; I think there was no venom, if he had any it wasn't very great,—probably at that time he didn't control himself as he did at other times,—he said if he hadn't got that crack in the jaw this wouldn't have happened. So far as I could see, I didn't feel he would kill anybody in cold blood, I think he just was worked up to the pitch he got too excited, that he just went beyond himself, but I think he is a sane man."

There was no direct evidence to the contrary. Furthermore, it appears that on the trial of the issue of "not guilty by reason of insanity", after the jury had been in conference for approximately one-half hour, it returned into court, whereupon the following colloquy occurred:

"The Court: I understand, Mr. Foreman, there is something you wish to take up with the court?

"Juror Godfrey Simon: Yes, your Honor, we can't seem to come to any agreement whatever. If we had had the evidence that was presented today, yesterday, the jurors feel like there would have been an entirely different verdict, and they ask for further instructions what we should do.

"The Court: My only answer to you, Mr. Foreman, is, the question which is submitted to you and which you are to decide is the fact as to whether the defendant was sane or insane at the time of the commission of the act alleged in the information.

"Juror Simon: I understand, but I haven't found the jurors willing to vote upon it."

It thus becomes clear that, had the issue of "not guilty" been tried contemporaneously with the issue of "not guilty by reason of insanity" (as formerly was permitted by statute), a verdict would have been returned that would have been "entirely different" from a verdict of "guilty of first degree murder". In other words, the verdict could have been no greater than "first degree murder", with recommendation of life imprisonment. But the verdict might have been "second degree murder", or even "manslaughter".

Although with reference to the provisions of subdivision 6 of section 1181 of the Penal Code, which purport to empower this court to modify a judgment of conviction by decreasing the degree of the crime, I deny that the legislature possesses any such power, but, to the contrary, insist that all jurisdiction and powers of this court must be conferred thereon by constitutional provision (People v. French, 12 Cal.2d 720, dissenting opinion, at page 780, 87 P.2d 1014), nevertheless, my conclusion herein, based upon the inherent and implied power of this court, is that the offense should be reduced to that of second degree murder. People v. Kelley, 208 Cal. 387, 281 P. 609; People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385.

---

14 Cal.2d 532

PEOPLE v. WILLIAMS.

Cr. 4254.

Supreme Court of California.

Oct. 27, 1939.

Homicide 🔑338(1)

Where defendant pleaded guilty to charge of having murdered two men, evidence showed that he was sane when crimes were committed and when he was arraigned for plea, and no other result than conviction for first degree murder as reached by trial judge would have been possible, the admission in evidence, over defendant's objections, of photographs showing location on the ground where certain bits of evidence were situated and of personal property which had belonged to one of the men killed was not prejudicial error.

In Bank.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

James Charles Williams was convicted of murder in the first degree, and he appeals.

Affirmed.

William Shaw, for appellant.

Earl Warren, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Earl Redwine, Dist. Atty., of Riverside, for the People.

PER CURIAM.

On his arraignment for plea on a charge of having murdered two men, named respectively E. H. Weimers and Robert Clay Martin, defendant pleaded guilty. Evidence which thereupon was introduced and which related to the manner in which the crimes were committed, and the surrounding circumstances, disclosed the existence of the following pertinent facts, to-wit: Defendant was a farm laborer, 32 years of age. For a considerable period of time preceding the date of the commission of the two homicides, defendant had been in the regular employ of Weimers, who was engaged principally in the raising of turkeys on a 40-acre ranch owned by him and located near the town of Blythe, California. During the period of such employment, and up to the date when the homicides were committed, defendant had been living in a tent which he owned and which occupied an appropriate space on the property of his employer. For some reason that apparently was satisfactory to Mr. Weimers, defendant was relieved of his regular duties as an employee, and Robert Martin was employed permanently in the place of defendant, who was, however, permitted to continue in the occupancy of his tent, which remained on the premises. After Martin had supplanted the defendant as permanent employee, the services of defendant were engaged by Weimers only for short periods of time, or on odd jobs, as emergencies occurred which required extra help. Apparently, no ill feeling existed between defendant and either or both of the other two men. However, it appears that, secretly, defendant resented the fact that he had been displaced in his employment by Martin, and that defendant nursed that resentment against both of the other men. On the day on which the homicides were committed, Weimers left his ranch and, in an automobile which he owned, went on a trip to the town of Blythe. The record shows that during the absence of Weimers, defendant resolved to kill both Martin and Weimers, and made his plans accordingly. Defendant knew that at about 4:30 o'clock p. m. Martin was in the habit of feeding the turkeys on the ranch, and that, at about that hour, in order to procure the necessary grain for that purpose, Martin would enter a certain building referred to as a "brooder house" that was located on the property.

Defendant was the owner of a .22 caliber repeating rifle, which he loaded, and thereupon "lay in wait" for Martin behind the said building. After Martin had reached the entrance of the building,—at what appeared to defendant to be a favorable moment for the accomplishment of his purpose,—defendant shot Martin in the face with the rifle. Thereupon Martin ran from the immediate presence of defendant, who followed Martin and shot him again, first in the back and then in the back of the head. After Martin had fallen, defendant dragged the body of Martin "by one foot" a short distance and covered it with some straw, in order that the body might not be seen by any person who might be passing the property, or who might call thereat for any purpose. It also appears that Weimers was the owner of two dogs. Before he left his ranch to go to the town of Blythe, in accordance with his usual custom in that regard, he placed the dogs within a small enclosure or yard that was adjacent to his house on the premises. In consequence of the shooting of Martin, the dogs barked and made considerable disturbance. Fearing that such noise might attract the attention of some passerby, defendant shot and killed both the dogs and thereupon concealed their bodies in a "cooler", a small wooden structure that was built against the house. Defendant then entered Weimers' house, which he carefully searched for money and other valuables. He secured several articles of clothing belonging to Weimers, his .38 caliber revolver, some cartridges for the revolver and 27 cents in cash. Defendant also procured a single-barrel repeating shotgun, which was the property of Weimers, which he loaded, and thereupon proceeded to "lay in wait" for Weimers. On Weimers' appearance at the ranch, and near the place where he had concealed himself, defendant shot and killed Weimers with such gun, in practically the same manner in which theretofore defendant had killed Martin. Thereupon, defendant appropriated Weimers' automobile to his own use and attempted to make his escape,—taking with him the wearing apparel and other articles belonging to Weimers which he had secured from the house. However, the commission of the crimes was soon discovered and defendant was apprehended at a distance of about 80 miles from the ranch. He not only freely and voluntarily confessed that he had killed both Martin and Weimers, but also, after he had been returned to the scene of the crimes, he reenacted the manner in which and indicated the place where each of the offenses had been committed.

Defendant having pleaded "guilty" and the evidence that was thereupon introduced having disclosed the existence of facts and circumstances substantially as hereinbefore has been set forth, the degree of defendant's crimes was "determined" by the court to be murder in the first degree, and judgment was thereupon pronounced that, as penalty therefor, defendant should "suffer death".

Under the provisions of section 1239 of the Penal Code, an appeal to this court from the said judgment has been "automatically taken without any action by the defendant or his attorney". Although, on his arraignment for plea, defendant was represented by counsel, neither brief nor oral argument has been presented to this court in behalf of defendant. The duty therefore has been cast upon this court to search the record herein for the purpose of reaching a conclusion as to the question whether defendant was accorded a fair hearing, both at the time when he entered his plea and immediately thereafter, on the taking of evidence by the court, to the end that the degree of the crimes might be determined. As hereinbefore has been stated, on his arraignment for plea in the trial court, defendant pleaded "guilty" to each count that was contained in the information which had been filed against him,—following which, in accordance with the provisions of section 1192 of the Penal Code, evidence was received by the court solely for the purpose of determining the degree of the offenses that had been committed by defendant. 8 Cal. Jur. 457; 13 Cal.Jur. 674.

Other than an implication that might be said to arise from the fact that a few objections were interposed by counsel who represented defendant,—regarding the admissibility of certain exhibits,—no procedural or other irregularity of any sort appears in the record. In regard to those objections, the most that is disclosed is that,—in the matter of introduction in evidence of certain photographs,—for the purpose of making clear the location or relative position on the ground where certain bits of evidence were situated, the photographer placed some foreign object, such as a stick, a tin can, or a light globe,—for example, to relatively locate in such photographs "a 12-gauge shotgun shell"; a spot of blood; a shotgun wad; a .22 caliber cartridge shell; and a "hat in the ditch". Each of defendant's objections to the introduction of such photographs was overruled. Furthermore, in that connection, it appears that among the several articles of personal property that belonged to Weimers, and which defendant had stated were taken by him from the house before Weimers had been killed, were a .38 caliber Smith & Wesson revolver, a coat, trousers, shirt, hat and a pair of shoes. In attempting to place before the trial court "the entire picture" of the crimes that had been committed by defendant, the prosecution offered in evidence each of such articles. Each of defendant's objections to the introduction of such evidence was overruled by the court. But it is obvious that, since defendant already had pleaded "guilty" to the charges, it becomes questionable whether subsequent procedural errors, if any, which may have occurred during the judicial inquiry held for the purpose of establishing a foundation for the exercise of the discretion of the trial judge in the matter of determining what penalty should be imposed, may properly be subjected to the same degree of strictness regarding the admission or the rejection of evidence as should obtain on the trial of an action in which the guilt of a defendant is to be determined. People v. Popescue, 345 Ill. 142, 177 N.E. 739, 744; and see annotation, 77 A.L.R. 1199, 1213.

With regard to that question, in the case entitled People v. Popescue, supra, the court said: "* * * it must be apparent that, where a defendant waives a jury trial and pleads guilty and asks for no trial, no issue remains, and there is nothing to try. The right to a jury is waived, and with it, of course, the constitutional guaranties with respect to the conduct of criminal trials. A plea of guilty waives any defect not jurisdictional. * * * In many decisions of other jurisdictions it has been held that, where the court has discretion in fixing the punishment, it may consider * * * such other evidence as it may deem necessary, as a guide in determining the punishment to be imposed * * * and in considering evidence in aggravation or mitigation of the offense the court may consider many matters *'not admissible on the issue of guilt or innocence'* (Toomer v. State, 112 Md. 285, 76 A. 118). * * * this was not a * * * trial of any kind, but was simply a statutory hearing, by which the court examined witnesses to determine whether any facts existed to aggravate or mitigate the punishment * * *." (Emphasis added.)

And in 16 Corpus Juris, page 402, section 738, it is said: "A plea of guilty is a confession of guilt and is equivalent to a conviction. * * * A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement. * * The right to a jury is waived also, and with it of course the constitutional guaranties with respect to the conduct of criminal prosecutions." In section 3065, page 1297, it also is said, "The court may consider the moral character of accused as a guide in determining the punishment to be imposed, and may hear for this purpose such evidence as it may deem necessary. Likewise the court may take into consideration evidence as to matters which may be in aggravation or mitigation of the offense, *although not admissible on the issue of guilt or innocence.*" Again, in section 3211, page 1363, it is said, "In determining the punishment to be imposed the court should consider the nature of the offense and *the attending circumstances,* * * * [together with] the motives actuating the crime, * * *." (Emphasis added.)

Also, in People v. McWilliams, 348 Ill. 333, 180 N.E. 832, 833, 834, it was said: "The hearing is not for the purpose of determining guilt or innocence, but has for its sole object the determination of the degree of punishment of the prisoner in the light of the circumstances surrounding him. People v. Popescue, 345 Ill. 142, 177 N.E. 739 [77 A.L.R. 1199]. In deciding this question, the court is not confined to the evidence showing guilt, for that issue has been settled by the plea. *The rules of evidence which ordinarily obtain in a trial where guilt is denied do not bind the court in its inquiry.* It may look to the facts of the killing, and it may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense." (Emphasis added.)

And in the case entitled McCarty v. Hopkins, 61 Neb. 550, 85 N.W. 540, 541, the court said, "* * * the right to a trial, anywhere or under any conditions, may be waived, and in practice is waived, when the accused makes a judicial confession of his guilt. When no issue is raised,—when the prisoner pleads guilty to the information or indictment,—there is nothing to try. The right to a jury is waived, and within it, of course, the constitutional guaranties with respect to the conduct of criminal prosecutions." See, also, Hudspeth v. State, 188 Ark. 323, 67 S.W.2d 191; State v. Reeder, 79 S.C. 139, 60 S.E. 434, 14 Ann.Cas. 968.

In United States v. Dalhover, 7 Cir., 96 F.2d 355, 359, the defendant pleaded guilty to a charge of murder, and although in that case a jury was impaneled to fix his punishment, the same question arose there as is present here, that is, whether procedural errors (if any), which might have occurred during the inquiry held to determine the degree of the crime after a plea of guilty, should be subjected to the same rule of strictness—as to their admissibility or rejection as evidence—as would have been applied in a trial on a plea of "not guilty". Appellant there contended the same rules should have been applied and, in discussing the question, the court said:

"It is obvious that the lawmakers recognized that men, motives and intentions differ widely, and that the circumstances in each case are never the same. It is quite apparent that Congress provided the different degrees of punishment in order to fit the different circumstances in each case, and the different degrees of malice, premeditation, willfullness and deliberateness as established by the evidence. A plea of guilty does not prevent or render unnecessary the proof of all pertinent facts bearing on these matters. We hold that all the pertinent facts and circumstances with respect to the robbery, the shooting * * * the flight, the pursuit, the attempted capture * * * the arrest of appellant and his associates * * * the killing of Brady and Shaffer, the actions of each of the bandits at Bangor and *all the property in their possession,* were competent not only to establish guilt if it had been denied, but to be considered by the jury in fixing the punishment. * * At Baltimore and Bangor the bandits were merely trying to escape arrest for the robbery and murder, and what they did at that time and what they had with them was clearly admissible not only as bearing upon their guilt of the robbery and the murder, but also in disclosing a lack of contrition, and a continuity of similar and unrelated criminal tendencies which were quite proper for the jury to consider in fixing the penalty. It is contended by appellant that the court erred in admitting in evidence the blood-soaked shirt of the deceased, worn by him at the time he was shot. There is no merit in this contention. * * * Appellant further contends that the court erred in permitting the Government to have brought into the courtroom before the jury, a group of guns, including two large machine guns, seized at Bangor, and in permitting a Government witness to answer in the affirmative as to whether or not the gun resting on the clerk's desk was one of the machine guns found in the automobile which had been occupied by appellant and his two associates at Bangor. *There was no error with respect to either of these rulings.* * * * Likewise all facts and circumstances attending his arrest were admissible. * * * This, of course, would include all weapons found in appellant's possession and custody, at and immediately prior to his arrest (see Pedersen v. United States, 2 Cir., 271 F. 187; People v. Morse, 196 N.Y. 306, 89 N.E. 816; People v. Mar Gin Suie, 11 Cal.App. 42, 103 P. 951), as well as those found in the custody of his abettors and confederates." (Emphasis added.)

Although not directly announcing a view to the contrary of that declared in the cited cases, but at least clearly indicating that a defendant is as much interested and has nearly as great a right in having the degree of his offense properly determined as in the first instance he has in having the question either of his guilt or his innocence legally adjudged, are the conclusions as announced in the following cases:

In the case entitled People v. Bellon, 180 Cal. 706, 182 P. 420, it was said: "While, as has been held, the proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial, there being no issue joined, the statute does require, at least impliedly, a judicial determination based on evidence. See People v. Chew Lan Ong, 141 Cal. 550, 75 P. 186, 99 Am.St. Rep. 88. The appropriate and proper method for a court to pursue in such a case is to receive such competent evidence from the respective parties as is material to the question of degree, and, the evidence having been concluded, to pronounce its determination thereon."

And, in People v. Hall, 105 Cal.App. 359, 362, 287 P. 533, it was said: "Appellants next complain of the admission in evidence of their extrajudicial confessions for the purpose of ascertaining their degree of crime without a showing first being made that such confessions were free and voluntary. The contention is without merit. No objection was made by appellants to this evidence, but, even assuming that the burden was upon the prosecution to show that the confessions were freely and voluntarily made before they could be properly received, a hearing to determine the degree of crime, after a plea of guilty, is in no sense a trial. People v. Chew Lan Ong, 141 Cal. 550, 75 P. 186, 99 Am.St.Rep. 88. *It is a mere investigation to determine the degree of guilt.*" (Emphasis added.)

Also, in the case of People v. O'Brien, 122 Cal.App. 147, 155, 157, 9 P.2d 902, 905, the court said: "Notwithstanding the fact that it has been decided that the hearing which may be conducted by the trial court for the purpose of determining the degree of the offense 'is not a trial,' nevertheless the only means by or through which the court is authorized to reach a conclusion in the matter is by the aid of evidence People v. Chew Lan Ong, 141 Cal. [550], 551, 553, 75 P. 186, 187, 99 Am.St.Rep. 88; People v. Bellon, 180 Cal. 706, 182 P. 420, 421. * * * In effect, in each of the foregoing cases the Supreme Court held that the defendant was in no wise prejudiced by the irregular manner in which the hearing had been conducted. A similar conclusion in a like proceeding was reached in the case of People v. Hall, 105 Cal.App. 359, 287 P. 533, where the error of which complaint was made consisted of the admission in evidence of extra-judicial confessions 'without a showing first being made that such confessions were free and voluntary.' * * * in each of the latter [cases] a regular hearing was had; while in the instant case there was no hearing as such. Neither from the record herein, nor from the statements of respective counsel, does it appear that, other than the formal application by defendant for probation, coupled with the 'report' thereon by the probation officer, any attempt was made by the trial court to ascertain the facts essential to a determination of the degree of the offense. * * * It may not therefore be legally declared that the action of the trial court in the premises was not substantially prejudicial to the rights of defendant." See, also, Commonwealth v. Polens, 327 Pa. 554, 194 A. 652.

However, in the instant case, the question discussed in the cited cases becomes purely academic for the reason that, on consideration of the objections which were made by defendant, it is clear that none of them was meritorious or of such importance that, had they been sustained, a result different from that which was reached by the trial judge would have been probable, or even humanly possible. Judged by the evidence, the guilt of defendant was unmistakable; nor could his sanity reasonably be questioned. True, as the result of his deliberate acts and intent, he murdered two men in cold blood; but, aside from the acts themselves, as disclosed by defendant's extra-judicial statements, the evidence shows entire sanity on the part of defendant. The killings were carefully planned by defendant, and were executed in minute detail in accordance therewith. He fully realized—at the time they were planned—that he was about to commit infamous and revolting crimes; and he knew that if he did so, and that fact should be judicially established, he would be sentenced either to suffer death or, at least, to life imprisonment. He deliberately chose to commit the offenses and take the chances of escape,—or, failing in that regard, to pay whatever penalty might be imposed. As expressed by some of the alienists who, prior to the entry of the plea by defendant, and the taking of evidence relative to the degree of the crimes, had made an examination with regard to the mental status of defendant, he was sane both at the time when the crimes were committed, and when he was arraigned for plea. In the eyes of the law, in no sense was either of the homicides either excusable or justifiable. It manifestly appears that no prejudicial error was committed by the trial court in the course of the proceedings had against defendant.

The judgment is affirmed.

35 Cal.App.2d 366

DORR v. REHKOPF.

Civ. 12288.

District Court of Appeal, Second District, Division 2, California.

Nov. 3, 1939.

1. Appeal and error ⚿996

Where a reasonable inference may be drawn supporting a finding of fact either in favor of plaintiff or defendant, jury's determination is conclusive upon appellate court.

2. Automobiles ⚿244(37)

In action for injuries suffered when automobile in which guest was riding struck automobile driven by defendant who was attempting to make a left turn at intersection without signalling his intention and without passing immediately to right of center of intersection, evidence sustained finding that driver of guest's automobile was negligent in operating it at excessive speed, and that such negligence was the sole proximate cause of accident. Vehicle Code § 544, St.1935, p. 185.

* * *

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action to recover damages for injuries suffered in automobile accident by Edna Dorr against William Rehkopf, sometimes known as W. G. Rehkopf, Jr., sometimes known as Bill Rehkopf. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

August J. O'Connor and George J. Hider, both of Los Angeles, for appellant.

Joseph A. Spray, of Los Angeles (Charles P. Gould, of Los Angeles, of counsel) for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages resulting from an automobile accident, plaintiff appeals.

The essential facts are:

June 26, 1937, plaintiff was riding as a guest in an automobile which was being operated by Herman C. Werk, Jr., at a speed of 50 miles per hour in a southerly direction on Fremont avenue and approaching its intersection with Commonwealth avenue in the city of Alhambra, California. At the same time defendant Rehkopf was proceeding in his automobile in a northerly direction on Fremont avenue and approaching the same intersection. Defendant Rehkopf entered the intersection and turned to the west on Commonwealth avenue. As he did so, the right rear of his car was struck by plaintiff's automobile. In turning to the left defendant Rehkopf failed to comply with the provisions of section 544 of the Vehicle Code, St.1935, p. 185 (i. e., by giving an appropriate signal during the last 50 feet his automobile traveled before turning, indicating that he intended to turn to the left), and of section 540 of the same code (i. e., by passing immediately to the right of the center of the intersection before turning).

This is the question presented for determination:

Was there substantial evidence to sustain the implied findings of the trial jury that (a) the driver of the car in which plaintiff was riding was negligent in operating his automobile at a speed of fifty miles per hour in approaching the intersection, and (b) such negligence was the sole proximate cause of the accident?

[1] This question must be answered in the affirmative. There is substantial evidence to sustain the finding of facts set forth above. The law is settled that, where a reasonable inference may be drawn supporting a finding of fact either in favor of the plaintiff or defendant, the trial jury's determination of the fact is conclusive upon an appellate court. 19 Cal.Jur.[1925] 776, § 166; 5 C.J.S. [1937], Appeal and Error, p. 611, § 1648.

Viewing the evidence in the light most favorable to the defendants (respondents), there is substantial evidence to sustain a finding that the driver of the car in which plaintiff was riding was negligent in driving his automobile at a speed of fifty miles per hour in approaching the intersection, and also that such negligence was the sole proximate cause of the accident. For example, there was testimony that defendant Rehkopf saw the automobile in which plaintiff was riding for the first time when said defendant was 25 feet south of the southerly curb line of Commonwealth avenue and that at the same time the automobile in which plaintiff was riding was 300 to 350 feet north of the intersection, at which time said defendant did not know the speed at which the car approaching him was traveling, and it was only after said defendant had turned his car to the left in the intersection that he saw the other automobile was approximately 50 feet away from him, traveling at an excessive rate of speed.

[2] From this evidence the inference may be drawn that, even assuming defendant Rehkopf was negligent, the driver of the automobile in which plaintiff was riding was likewise negligent and such negligence was the sole proximate cause of the accident.

For the foregoing reasons the judgment is affirmed.

I concur: WOOD, Acting P. J.

35 Cal.App.2d 316

PEOPLE v. SANCHEZ.

Cr. 1692.

District Court of Appeal, Third District, California.

Oct. 31, 1939.

1. Robbery 🔑17(3)

In prosecution for an attempt to commit robbery, failure of information to allege the taking of "personal property" was not prejudicial where allegation of information that defendant attempted to "take" implied physical seizure of something tangible and defendant who failed to interpose a demurrer to information was fully informed of charge by testimony taken at preliminary examination. Pen.Code, §§ 211, 1004.

[Ed. Note.—For other definitions of "Take," see Words & Phrases.]

2. Criminal law 🔑1167(1)

An error in an information which does not prevent a defendant of common understanding from being fully informed as to the charge against him is not prejudicial.

3. Robbery 🔑24(2)

Evidence that defendant struck prosecuting witness while she was walking along street at night carrying white purse under her arm and that prosecuting witness could not remember whether defendant had attempted to seize purse was sufficient to establish defendant's intent to commit robbery where witness' purse was plainly visible and fact that assault occurred not far from a carnival and on or near a viaduct fairly eliminated possibility that defendant intended to commit another crime. Pen.Code, §§ 21, 211.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Adolph Sanchez was convicted of attempted robbery, and he appeals.

Affirmed.

J. B. Freeman, of Stockton, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant and one Campos were jointly charged and separately tried for an attempt to commit robbery. From the judgment of conviction of Sanchez he prosecutes this appeal, as well as from an order denying his motion for a new trial.

Two points are here urged: First, the information failed to state a public offense; and, second: that the evidence was insufficient to support the judgment.

The information sets forth that "the said Angelo Campos and Adolph Sanchez are accused by the District Attorney * * * by this information, of the crime of attempt to commit robbery, a felony, committed as follows: The said Angelo Campos and Adolph Sanchez did * * * wilfully, unlawfully and feloniously, and by means of force and fear, attempt to take from the person and immediate presence of one Ethel Barkhorn, against the will and without the consent of the said Ethel Barkhorn, and to accomplish said taking by means of force * * * and * * * then and there putting the said Ethel Barkhorn in fear". The designated weakness of the information is the obvious omission of the words "personal property", after the word "take" in the information. This omission, however, is not a fatal defect.

[1, 2] The defendant was informed that he was accused by the information of the crime of attempted robbery, a felony.

Section 211 of the Penal Code defines robbery as the felonious taking of personal property in the possession of another, from his person or immediate presence. That, with the meaning of the word "take", which implies the physical seizure of something tangible, was sufficient to inform defendant of the nature of the charge. Furthermore, the testimony taken at the preliminary examination, a copy of which was delivered to defendant, clearly informed him of what he was charged. If any doubt or uncertainty existed in his mind, he should have interposed a demurrer to the information, upon the proper ground. Sec. 1004, Pen.Code. In People v. Hinshaw, 194 Cal. 1, 227 P. 156, it was held that an error in the information which did not prevent a defendant of common understanding from being fully informed as to the charge against him, is not prejudicial. In People v. Bonfanti, 40 Cal.App. 614, 181 P. 80, defendant was charged with attempted rape, but the information omitted to allege that the victim was not the wife of the accused. The court held the evidence supplied the defect, and defendant was not misled by the omission. Perhaps the leading case upon this point is People v. Beesly, 119 Cal.App. 82, 6 P.2d 114, 970, where the court considers the sufficiency of an indictment or information under the present statutes. Clearly, the accused here was not misled, or the preparation of his defense impeded by the omission complained of. See, also, People v. Rankin, 10 Cal. 2d 198, 74 P.2d 71; People v. Hirschler, 98 Cal.App. 499, 277 P. 170; People v. Pearson, 69 Cal.App. 524, 231 P. 612.

[3] As to the insufficiency of the evidence appellant urges that there was no testimony showing appellant attempted to rob Mrs. Barkhorn, and that all that appeared from the evidence was an aggravated assault and battery, with no intent to rob proven, and that the prosecution failed to sustain its burden of proving intent, which must appear beyond a reasonable doubt. The evidence is brief. The complaining witness was a waitress; she left her place of employment about 11:30 p. m. on the night in question, but missing her streetcar, started to walk to her home. During all the time here involved she carried her purse, made of a white material, 9 by 12 inches in size, under her left arm, with the handle looped over the arm. Upon her way she had occasion to pass over a bridge or viaduct. As she approached the bridge she saw defendant and his companion approaching from the opposite direction. As the two men came abreast of her, defendant seized her by the left arm, struck her in the face and attempted to kick her feet from under her. Campos seized her right arm, struck her a violent blow in the stomach, and as she started to scream, seized her by the throat. Defendant then ran away; Campos lingered long enough to again try to stifle her cries by choking her, and struck her several blows in the face before fleeing. The purse remained tightly pressed under the arm of Mrs. Barkhorn. She was asked if either of her assailants attempted to seize her purse, but she answered she could not say. No word was spoken by either assailant, and whether these men were attempting an assault, battery, rape, or robbery was to be determined by the court, sitting as a jury, from all the facts in evidence. "The intent or intention is manifested by the circumstances connected with the offense". (Pen. Code, § 21.) Here, the purse was plainly visible; the attack was made not far from a carnival then in progress, and on or near a viaduct over a slough. The circumstances fairly eliminate all other crimes other than robbery, and is the only reasonable inference from the facts. The trial court was fully justified in so finding.

In People v. Hite, 135 Cal. 76, 67 P. 57, 58, the defendant met the complainant in a saloon. As he left for his hotel about 3 o'clock in the morning, defendant seized the complainant and made an assault upon him. He called for help, and the attacker fled without touching any of the money he had upon him. The court said: "On this evidence it was the peculiar province of the jury to determine the question of the intention with which this violent and unlooked-for assault was made upon a half-drunken stranger at 3 o'clock in the morning. This is the time and this is the way in which robberies are sometimes committed * * *", citing People v. Woody, 48 Cal. 80; People v. Johnson, 131 Cal. 511, 63 P. 842. See, also People v. Gonzales, 69 Cal.App. 609, 610, 231 P. 1014; People v. Gordon, 61 Cal.App. 98, 214 P. 276; People v. McNabb, 17 Cal.App. 154, 118 P. 945; People v. Franklin, 46 Cal.App. 1, 188 P. 607; 22 Cal.Jur., page 843.

The evidence in this case is clear and uncontradicted, the defendant offering no interpretation of his acts.

The judgment and order must be affirmed, and it is so ordered.

We concur: TUTTLE, J.; THOMPSON, J.

35 Cal.App.2d 356

WERK v. REHKOPF et al.

Civ. 12201.

District Court of Appeal, Second District, Division 2, California.

Nov. 3, 1939.

1. Automobiles ⇨244(36, 43)

In action for damages allegedly resulting from automobile collision occurring at street intersection, evidence sustained implied finding that codefendant's failure to comply with provisions of Vehicle Code respecting the giving of signals and the making of right and left turns was not proximate cause of accident, and that plaintiff was guilty of contributory negligence in operating his automobile at a speed in excess of prima facie speed limit fixed by Vehicle Code. Vehicle Code, §§ 511, 540, 544, St.1935, pp. 177, 184, 185.

2. Appeal and error ⇨996

Where, from the evidence, a reasonable inference may be drawn supporting a finding of fact either for plaintiff or defendant, jury's determination of facts is conclusive upon an appellate court.

3. Appeal and error ⇨930(1)

On plaintiff's appeal from judgment for defendants, after trial by jury, evidence was viewed in light most favorable to defendants.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Herman C. Werk, Jr., against William Rehkopf, sometimes known as W. G. Rehkopf, Jr., sometimes known as Bill Rehkopf, and others, for damages allegedly resulting from an automobile accident. From a judgment for defendants, plaintiff appeals.

Affirmed.

August J. O'Connor and George J. Hider, both of Los Angeles, for appellant.

Joseph A. Spray, of Los Angeles (Charles P. Gould, of Los Angeles, of counsel), for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial by jury in an action to recover damages resulting from an automobile accident plaintiff appeals.

The essential facts are:

June 26, 1937, plaintiff was operating his automobile at a speed of fifty miles per hour in a southerly direction on Fremont avenue and approaching its intersection with Commonwealth avenue in the city of Alhambra, California. At the same time the defendant Rehkopf was proceeding in his automobile in a northerly direction on Fremont avenue and approaching the same intersection. Defendant Rehkopf entered the intersection and turned to the west on Commonwealth avenue. As he did so, the right rear of his car was struck by plaintiff's automobile. In turning to the left defendant Rehkopf failed to comply with the provisions of section 544 of the Vehicle Code, St.1935, p. 185 (i. e., by giving an appropriate signal during the last 50 feet his automobile traveled before turning, indicating that he intended to turn to the left), and of section 540 of the same code (i. e., by passing immediately to the right of the center of the intersection before turning). Likewise in approaching the intersection plaintiff was exceeding the prima facie speed limit fixed by section 511 of the Vehicle Code.

This is the question presented for determination:

Was there substantial evidence to sustain the implied findings of the trial jury that (a) defendant Rehkopf's failure to comply with sections 544 and 540 of the Vehicle Code were not the proximate cause of the accident, and (b) plaintiff was guilty of contributory negligence in operating his automobile at a speed in excess of the prima facie speed limit fixed by section 511 of the Vehicle Code?

[1, 2] This question must be answered in the affirmative. There is substantial evidence to sustain the facts set forth

above and it is unnecessary to cite authority for the proposition that, where from the evidence a reasonable inference may be drawn supporting a finding of fact either in favor of the plaintiff or defendant, the trial jury's determination of the facts is conclusive upon an appellate court.

[3] Viewing the evidence in the light most favorable to the defendants (respondents), there is substantial evidence to sustain a finding that defendant Rehkopf's negligence was not the proximate cause of the accident and plaintiff was guilty of contributory negligence in operating his automobile at a speed of fifty miles per hour. The verdict of the jury on these points in favor of defendants is conclusive here.

The judgment is affirmed.

I concur: WOOD, Acting P. J.

---

35 Cal.App.2d 336

HOUSE et ux. v. PACIFIC GREYHOUND LINES.

Civ. 6205.

District Court of Appeal, Third District, California.

Oct. 31, 1939.

1. Evidence 🔑194, 483(1)

In action for wrongful death wherein identity of victim of bus accident was in issue, permitting mortician to make visual comparison of cloth taken from victim's body and vest in particular person's suitcase, and to testify that the cloth resembled the vest, was not error, though mortician had no special knowledge of fabrics as jury could have made the comparison themselves.

2. Death 🔑75

In action for wrongful death, wherein identity of victim of bus accident as plaintiffs' son was in issue, evidence *held* to authorize verdict for plaintiffs.

3. Death 🔑99(3)

$12,000 for death of plaintiffs' 18-year-old son, who had good habits, assisted in support of family, and was in good health, studious, and ambitious, *held* not excessive.

4. Death 🔑97

Some play is allowed to the discretion of the jury in measuring amount of damages for death of spouse or parents.

5. Trial 🔑133(6)

Strong intimation by plaintiffs' attorney that defendant had been instrumental in advising witness to refuse to obey plaintiffs' subpœna, though improper, was not ground for reversal where trial court gave admonition after colloquy of counsel. Code Civ. Proc. § 1989.

6. Appeal and error 🔑1060(1)

In action for wrongful death, injecting the issue of plaintiffs' poverty was not ground for reversal, where some of the evidence complained of was brought out by defendant on cross-examination, and court refused plaintiff's offer of proof of plaintiff's financial standing and followed the refusal by a curative admonition to the jury.

7. Trial 🔑36

Where defendant in wrongful death action, on the morning of trial and after jury had been impaneled, filed amended answer admitting negligence, permitting plaintiffs to introduce evidence of negligence was not error.

8. Courts 🔑2

Presence of wife as joint plaintiff in husband's action for wrongful death of son would at most constitute misjoinder and would not go to the court's jurisdiction.

9. Parties 🔑88(4)

Alleged misjoinder of wife in husband's action for wrongful death of son should be objected to by special demurrer when facts showing misjoinder appeared upon the face of complaint, and was waived by failure to object either by demurrer or answer. Code Civ.Proc. §§ 376, 378, 434.

10. Courts 🔑2

Legal incapacity of plaintiff to sue does not go to the court's jurisdiction. Code Civ. Proc. § 378.

11. Appeal and error 🔑1173(1)

Where clear right of action for wrongful death of son was stated in father as plaintiff, judgment should not be reversed on ground of misjoinder of mother as plaintiff, but proper remedy is dismissal as against the unnecessary party. Code Civ.Proc. §§ 376, 378, 434.

12. Death ⚷31(7)
Parent and child ⚷7(6)

The purpose of statute authorizing father to sue for injury or death of child was to designate the necessary party plaintiff in order that defendant might be protected against multiplicity of actions and that finality of litigation might be assured. Code Civ.Proc. § 376.

13. Death ⚷42
Parent and child ⚷7(6)

The statute authorizing father to sue for injury or death of child does not eliminate the joining of a proper party with the necessary party to the action. Code Civ. Proc. § 376.

◆

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by John V. House and another against the Pacific Greyhound Lines, for wrongful death of Carl James House in bus accident. From a judgment on a verdict for plaintiffs, defendant appeals.

Affirmed.

Carter, Barrett, Finley & Carlton, of Redding, for appellant.

L. C. Smith and Alfred E. Frazier, both of Redding, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In this action by plaintiffs, husband and wife, against the Pacific Greyhound Lines, a common carrier, for the alleged wrongful death of their son, Carl James House, it is alleged that Carl James House, a young man eighteen years of age, lost his life while a fare-paying passenger on a bus of the Greyhound Lines through its negligence, and that plaintiffs have been damaged thereby. By an amended answer defendant denied the identity of the deceased, the damages sustained and that as to Samie G. House the complaint failed to state a cause of action, and that the court had no jurisdiction of the subject-matter alleged in the complaint in so far as it related to any cause of action in her favor. The amended answer admitted the accident, and that the death occurred as a direct and proximate result of the negligence of the defendant. A judgment for $12,000 was returned in favor of plaintiffs and from that judgment this appeal is taken.

At about three o'clock in the morning of June 4, 1937, some miles north of Redding a stage owned and operated by the Pacific Greyhound Lines, carrying a driver and seven passengers, was wrecked and destroyed by fire. All of the passengers and the driver were killed. Plaintiffs claimed the body of one of the passengers as that of their son. The body was burned beyond recognition and identity was attempted to be established by a piece of suit material found on the body, and by the further fact that Carl James House left Chicago at 12:15 a. m. on the morning of June 1, 1937, on the bus of a connecting system, with a through ticket to Klamath Falls, Oregon, where he intended to meet his father, one of the plaintiffs herein. He checked his suitcase at Chicago to Klamath Falls, where it arrived a few days after the accident. The boy has never been heard of since the accident.

[1] In this suitcase was found a vest of the same peculiar texture, material and color as that of the small piece of cloth taken from the body removed from the stage. Error is claimed in permitting the mortician to compare this small piece of unburned cloth taken from the body of the victim with the vest found in the suitcase. The witness admitted he had no special knowledge as to fabrics, but all the witness did was to visually compare the two exhibits. No error was committed thereby. The witness was testifying as to appearance only in a matter which the jury could have done for themselves, but it was not error for the witness to testify that the piece of unburned cloth resembled in appearance that of the vest. Postcards were also introduced, written to friends of the boy, one postmarked Ogden 11:30 p. m., June 2, 1937, and another from Sacramento, marked 9:30 p. m., June 3, 1937. An official of the Greyhound Lines testified that the bus leaving Chicago at 12:15 a. m. June 1st, would arrive in Salt Lake City 9:35 p. m. June 2nd and arrive in Sacramento at 6 p. m. June 3rd, leaving the same day at 9:10 p. m. and would arrive at Redding at 1:55 a. m. June 4th. The stage in question was wrecked and burned shortly after that hour a few miles north of Redding.

George W. Young, Jr., of Chicago, with whom Carl James House was visiting in Chicago, testified he and other members of his family tried to induce young House to stay with them longer in Chicago, but he then stated he was anxious to get home to Klamath Falls. No members of the House family have seen or heard from their son since the accident and the last witness who testified he had seen him alive was his friend in Chicago on the morning of June 1st, as he boarded the bus for Klamath Falls. Appellant claims there is nothing to show that the Carl James House who was referred to by the Youngs in Chicago was the son of plaintiffs, but there is no question but that the young man Carl James House who left the home of his sister, Mrs. Frances Anderson, at Ocean Springs, Mississippi, with his schoolmate George W. Young, Jr., and his mother Mrs. Young, by automobile en route to Chicago was the son of plaintiffs. That fact is established by the sister. There is no doubt either but what this same boy purchased a through ticket in Chicago for Klamath Falls, Oregon, and boarded a bus at Chicago with this ticket on the early morning of June 1st. It is also in evidence that it was the expressed intention of this boy to go straight through to Klamath Falls. The time schedules of the bus and its connecting lines at Ogden and Sacramento coincide with the postmarks upon the cards written by the boy to friends from these points. The suitcase checked in Chicago through to Klamath Falls (and which an official of the stage line testified might be carried either on the same bus with the passenger or on a following conveyance) reached Klamath Falls after the accident and contained the clothing of the boy that had been placed therein by the sister. This sister described a suit belonging to the boy which she had packed in the suitcase that was similar to the vest found in the suitcase which also corresponded to the small piece of cloth found unburned upon the body taken from the stage. The mortician from his examination of the body also testified it was that of a man between eighteen and twenty-five years of age, weighing approximately 150 pounds and probably five feet eight inches in height.

[2] The foregoing facts and circumstances, together with the fact that the stage leaving Sacramento at about the time the postcard was mailed there by Carl House was the one involved in the accident and that no one has testified they have seen or heard of Carl James House in the year intervening between the accident and the trial of the action, are ample to justify the conclusion of the court and jury that the body taken from the wrecked stage was that of the son of plaintiffs and that he was killed in the accident in question.

[3] Appellants contend that the verdict of the jury in the sum of $12,000 was excessive. The evidence shows that Carl James House was eighteen years of age and in good health. He was in his junior year in high school and was preparing either for a course in law or forestry in some advanced school of learning. As a boy of eight or ten he had sold newspapers, making from a dollar to a dollar and a half a day, which he gave to his mother. At one time, while living in Long Beach, he sold ice cream, the proceeds of which he also gave his mother to assist in the support of the family. While attending school in Mississippi he was employed from time to time as a caddy on the nearby golf course, when he could spare the time from his studies. At Klamath Falls he worked in the mills and also did the cooking and kept the cabin in order in which he, his father and a third man lived. At home with his mother he did the work that might be expected of a boy at home, bringing in the wood, assisting in the family washing, building a cow shed, etc. His habits were good, he was obedient, did not smoke or drink and was never in any trouble. He was studious and ambitious. His father's age was forty-nine, with an expectancy of some twenty-one years, and his mother's age was forty-seven. His father was a day laborer. The health of the mother was not good, she being unable on that account to live in Klamath Falls.

In view of the foregoing facts, we cannot say that the jury was animated by passion or prejudice in arriving at the amount of the verdict. As said in Dickinson v. Southern Pacific Co., 172 Cal. 727, 158 P. 183, 185:

[4] "It is not possible to measure in exact terms of money the loss which a surviving husband, wife, or child may have sustained through being deprived of the comfort and society of the deceased spouse or parent. For this reason, some play is allowed to the discretion of the jury by the provision of section 377 [Code Civ.Proc.] that such damages may be allowed as under all the circumstances of the case may be just."

The reasoning in O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 339, 60 A.L.R. 1381, where a verdict of $10,250 was upheld for the death of a seven-year-old boy is here in point, where appellant claimed the verdict was excessive and directed attention to certain early cases. Mr. Justice Curtis, speaking for the court in the O'Meara case, in considering an earlier case where a judgment in favor of a parent for the death of a six-and-a-half-year-old boy was reversed solely upon the ground that the amount was excessive said:

"Under the present conditions that case [Wiezorek v. Ferris, 176 Cal. 353, 167 P. 234] cannot be accepted as a final authority in determining whether the verdict in the present action is excessive or not. On the other hand, the present verdict must be considered under the conditions prevailing at the present time, or at least at the time it was rendered in January, 1925. We must, as courts in other jurisdictions have done in passing upon similar questions as that involved herein, take judicial notice of the fact that the value of the dollar has materially changed from what it was some 10 to 15 years ago. Whether it is 'cut in half,' as intimated by the excerpt from one of the above-mentioned authorities, or not, it is universally admitted that it has materially decreased in value from what it was a few years ago. There has been a corresponding increase in wages and salaries as well as in the cost of living in all walks of life. The sum of $10,000 when measured by its present purchasing power is far less than what it formerly was. A verdict, therefore, in this amount for personal injuries, may well be sustained by the courts of to-day, when formerly it would have been their duty to set it aside as excessive. Before the advent of the present day conditions verdicts for the death of a child amounting to $5,000 or more were frequently rendered by juries, and sustained by the courts."

This record does not disclose that the amount of the verdict is so grossly disproportionate to any reasonable compensation as to even suggest that it was based on passion or prejudice.

[5] Misconduct is charged against counsel for the plaintiffs in that he charged attorneys for defendant with suppressing certain evidence. A former employee of defendant was subpoenaed by plaintiffs in Redding at the time he was then attending as a witness in another action. The former employee, a resident of Modesto, which is more than one hundred miles from the place of trial, failed to appear on the day of the trial, having refused, apparently under section 1989 of the Code of Civil Procedure, to attend as a witness. It was intimated rather strongly by the attorney for plaintiffs that defendant was instrumental in advising the witness as to his rights in refusing to obey the subpoena. While it is true the charges of counsel against defendant were improper and uncalled for, it cannot be said that such remarks were so erroneous as to call for a reversal, particularly in view of the admonition of the trial court, following the colloquy of counsel.

[6] Misconduct was also charged in injecting the issue of poverty of plaintiffs into the case. Some of such evidence was brought out, however, on cross-examination by defendant. Plaintiffs, however, did by an offer of proof, set forth the financial standing of plaintiffs, but this offer was refused by the court and was followed by a proper curative admonition to the jury. We can perceive no error of sufficient gravity to justify a reversal upon this ground.

[7] Objection was also made to the fact plaintiffs insisted upon introducing evidence at the trial of the negligence of defendant after such negligence had been admitted by defendant in an amended answer. The original answer denied any negligence, but on the morning of the trial and after the jury had been impaneled an amended answer was filed wherein defendant admitted negligence. In Martin v. Pacific Gas & Electric Co., 203 Cal. 291, 264 P. 246, 249, the defendant there attempted by an admission to limit the issues to the question of the amount of the damages to be awarded. The court there said: "Indeed, it never has been the law that it was or could be error to prove even admitted allegations of the pleadings if the patience of the trial court would permit it." To the same effect is Rowe v. Rennick, 112 Cal.App. 576, 297 P. 603.

The most serious objection urged by defendant is that the mother was an improper party plaintiff. Section 376 of the Code of Civil Procedure provides:

"A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, * * *."

[8-12] In the instant case the action was brought by John V. House and Samie

G. House, his wife, as plaintiffs, and the verdict found in favor of plaintiffs and the judgment based thereon ordered "that the plaintiffs, John V. House and Samie G. House, have and recover of and from the defendant, Pacific Greyhound Lines, a corporation, the sum of twelve thousand dollars". The presence of the wife as joint plaintiff would at most constitute a misjoinder and as all of the facts appeared upon the face of the complaint, objection should have been taken by special demurrer. No such demurrer was filed. In the original answer no objection was made to the presence of the wife as a party plaintiff. In the amended answer a special cause of action was set up alleging that the court had no jurisdiction of the subject-matter of the action in so far as it related to an alleged cause of action in favor of plaintiff, Samie G. House. Legal incapacity of the plaintiff to sue would not go to the jurisdiction of the court. Rosenbloom v. Southern Pac. Co., 59 Cal.App. 102, 210 P. 53; Crittenden v. Superior Court, 166 Cal. 340, 136 P. 287; Work v. Campbell, 164 Cal. 343, 128 P. 943, 43 L.R.A.,N.S., 581. So it would appear defendant had failed to raise the objection, if any, either by demurrer or answer and not having been so raised it must be deemed waived. Rosenbloom v. Southern Pac. Co., supra; sec. 434, Code Civ.Proc. But assuming, however, that that issue was properly presented, we still believe that defendant is not entitled to a reversal. The purpose of section 376 of the Code of Civil Procedure was to designate the necessary party plaintiff in order that a defendant might be protected against multiplicity of actions and that a finality of the litigation might be assured. Here the father was a necessary party and as such he was made plaintiff. Section 378 of the Code of Civil Procedure provides that: "All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist. * * *"

[13] Section 376 of the Code of Civil Procedure would not in effect eliminate the joining a proper party with the necessary party to the action. In Espinosa v. Haslam, 8 Cal.App.2d 213, 47 P.2d 479, a situation arose that might have been prevented if the procedure here followed were there adopted. There it became necessary for the court to determine as a mattor of fact whether the father, although divorced from the wife, had at the time of the accident to a son, actually deserted his family, and whether the father or the mother was the necessary party plaintiff. Furthermore, where a clear right of action is stated in the father as plaintiff, a judgment should not be reversed even though proper objections were made, the remedy being dismissal as to the unnecessary party. Gillespie v. Gouly, 152 Cal. 643, 93 P. 856. In Abos v. Martyn, 10 Cal.App.2d 698, 52 P.2d 987, a wife was made a party plaintiff for the reason the proceeds of the judgment would become community property and the mother, having an interest therein, was properly joined as plaintiff. If it is necessary to examine the laws of the foreign jurisdiction to determine the right of a necessary party plaintiff to an action filed in California for an injury inflicted in California, we find justification in the laws of Oregon for her being joined as party plaintiff. In section 33-304, Oregon Code, it is provided that equal rights and responsibilities are given both parents, not only in the custody and earnings of the children, but also as to inheritance from an unmarried minor, and an equal right of support. Oregon Code, 27-1402.

It would therefore appear from an examination of the entire record that there has been no miscarriage of justice in this case and we are impelled thereby to an affirmance of the judgment. It is so ordered.

We concur: TUTTLE, J.; THOMPSON, J.

35 Cal.App.2d 347

PEOPLE v. YODER et al.

Cr. 3224.

District Court of Appeal, Second District, Division 2, California.

Nov. 2, 1939.

1. Gaming ⚷98(5)

Evidence, consisting of testimony of police officer that he saw an unidentified man in basement where several men were gathered betting on horse races give defendant $2 and that he heard unidentified man say to defendant, "Give me $2 to win on 725," was insufficient to support conviction of violating statute relative to keeping room with devices for purpose of registering bets or wagers, where it was not shown defendant either kept or occupied room in which he was arrested, or that he had any device for purpose of registering bets. Pen.Code, § 337a, subd. 2.

2. Criminal law ⚷552(3)

Where guilt of defendant is predicated upon circumstantial evidence, the character of evidence must be not only consistent with hypothesis of guilt but inconsistent with any rational hypothesis of innocence.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Farrell Yoder, Joseph Newman, and Norman Thelen were convicted of violating statute relative to keeping room with devices for purpose of registering bets or wagers, and Joseph Newman alone appeals.

Reversed.

Leland E. Zeman, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

McCOMB, Justice.

After trial before the court without a jury appellant was convicted of violating subdivision 2 of section 337a of the Penal Code. He appeals from the judgment of conviction, order denying his motion for a new trial, and order denying his motion in arrest of judgment.

Viewing the evidence most favorable to the respondent (the people), the essential facts are:

January 4, 1939, a police officer, looking through a window in the basement of a building in the city of Los Angeles saw a man hand appellant $2 and say to him, "Give me $2.00 to win on 725." Appellant placed the $2 in his pants pocket and said, "O. K." Thereafter the officer went into the basement room where there were between 35 and 50 men, and discovered that betting on horse races was taking place. After half an hour had elapsed, appellant was arrested.

[1] Appellant relies for reversal of the judgment on this proposition:

There is no substantial evidence to sustain the facts upon which the judgment was predicated.

This proposition is tenable. Subdivision 2 of section 337a of the Penal Code, so far as material here, makes it a penal offense for any person to keep or occupy a room "with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers."

In the instant case the sole evidence implicating appellant is that the officer saw an unidentified man hand appellant $2 which he placed in his pants pocket and heard the unidentified man say to appellant, "Give me $2.00 to win on 725", to which appellant replied "O. K.", and that thereafter upon being arrested appellant had two $1 bills in his right-hand trousers pocket along with other money totaling the sum of $76.

It is obvious that this evidence is wholly insufficient to sustain a finding that appellant either kept or occupied the room in which he was arrested or that he had a book or books, paper or papers, etc., for the purpose of recording or registering any bet or bets or any purported bet or bets, etc.

[2] There is no merit in respondent's contention that appellant was aiding and abetting in the maintenance of a room and paraphernalia for gambling, because it is as reasonable a conclusion from the evidence that the bettor was a friend of appellant and was merely asking appellant to place the bet for him, as it is to draw the conclusion that appellant was employed in the establishment and receiving the bet. Therefore, under the rule that, where the guilt of defendant is predicated upon circumstan-

tial evidence, the character of the evidence must be not only consistent with the hypothesis of guilt but inconsistent with any rational hypothesis of innocence (People v. Staples, 149 Cal. 405, 425, 86 P. 886; People v. Lamson, 1 Cal.2d 648, 661, 36 P.2d 361), this court is bound to assume from the evidence stated above that appellant was not an employee of a person or persons operating the establishment.

For the foregoing reasons the judgment is reversed.

I concur: WOOD, Acting P. J.

35 Cal.App.2d 329

PEOPLE v. McATEE.

Cr. 1696.

District Court of Appeal, Third District, California.
Oct. 31, 1939.

1. Records 🔑22

In prosecution of a clerk, for district attorney and county public administrator, for mutilating, altering and falsifying register of probate proceedings kept by public administrator, evidence that public administrator had made entries in register with respect to property coming into administrator's possession as administrator of certain estates, that defendant had cut out and destroyed pages of the register concerning two of the estates and had changed figures showing cash received in another estate, warranted conviction. Pen.Code, §§ 113, 114, 971; Probate Code, § 1151.

2. Records 🔑22

In prosecution of a clerk, for district attorney and county public administrator, for wilfully mutilating, altering and falsifying register of probate proceedings kept by public administrator, motive with which defendant altered and destroyed records was for jury. Pen.Code, §§ 113, 114, 971; Probate Code, § 1151.

3. Records 🔑22

The register of probate proceedings which the county public administrator is required by law to keep pursuant to Probate Code constitutes a "public record" within contemplation of statute punishing the wilful mutilation, falsification or destruction of public records. Pen.Code, §§ 113, 114; Probate Code, §§ 422, 1151; Pol.Code, § 4181.

[Ed. Note.—For other definitions of "Public Record," see Words & Phrases.]

4. Executors and administrators 🔑24

The purpose of statutes respecting office of county public administrator and requiring such officer to keep a register of probate proceedings and render reports to the probate court is to prevent fraud and insure honest administration of estates. Probate Code, §§ 422, 1151, 1153.

5. Records 🔑22

The wilful mutilation, falsification, alteration or destruction of a register of probate proceedings kept by a county public administrator is an offense under statutes punishing wilful alteration of public records. Pen.Code, §§ 113, 114; Probate Code, § 1151.

6. Records 🔑22

Where indictment of a clerk, for district attorney and county public administrator, charged the clerk with wilfully mutilating, altering, and falsifying the register of probate proceedings kept by public administrator with respect to certain estates, evidence that public administrator had made entries in register with respect to property coming into administrator's possession as administrator of certain estates, that defendant had cut out and destroyed pages of the register concerning two of the estates and changed figures showing cash received in another estate, was not at a fatal variance from allegations of indictment. Pen. Code, §§ 113, 114; Probate Code, § 1151; Pol.Code, § 4181.

7. Records 🔑22

A county public administrator is a "public officer," as respects whether administrator's register of probate proceedings is a public record, within statute punishing wilful alteration of public records. Pen.Code, §§ 113, 114; Probate Code, §§ 422, 910, 1151; Pol.Code, §§ 4013, 4181.

[Ed. Note.—For other definitions of "Officer," see Words & Phrases.]

8. Criminal law 🔑829(1)

Refusal to give defendant's proffered instructions which were adequately covered by other given instructions was not error.

9. Records ⚷22

If a public record, such as a register of probate proceedings kept by a county public administrator, is changed in good faith to make an erroneous statement of facts speak the truth, such alteration lacks a criminal intent to violate provisions of statute punishing the wilful alteration of public records. Pen.Code, §§ 113, 114; Probate Code, § 1151.

10. Criminal law ⚷829(3)

In prosecution of a clerk, for wilfully mutilating, altering and falsifying register of probate proceedings kept by public administrator, refusal of instruction stating that defendant must be acquitted unless jury found that he made the alterations in register as charged in each count, that alterations were not made by him in ordinary course of business, that alterations were false entries, and that defendant knew them to be false, was not prejudicial in view of given instructions.

◆

Appeal from Superior Court, Butte County; C. A. Paulsen, Judge.

Harold R. McAtee was convicted of wilfully mutilating, altering and falsifying the register of probate proceedings kept by the county public administrator, and he appeals.

Affirmed.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico (James M. Popper, of Chico, of counsel), for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant, who was acting as special investigator and also as clerk for J. R. King, Jr., the district attorney and the public administrator of Butte county, was convicted by a jury on three counts of an indictment charging him, under section 114 of the Penal Code, with wilfully mutilating, altering, and falsifying the register of probate proceedings kept by the public administrator, with respect to three separate estates which he was probating. The register was kept pursuant to section 1151 of the Probate Code. A judgment of conviction was rendered accordingly. A motion for new trial was denied. From the order denying a new trial and from the judgment this appeal was perfected.

For the purpose of this appeal it is conceded the defendant altered the probate register as charged in the indictment. It is contended, however, that the probate register of the public administrator is not such "public record" as is contemplated by sections 113 and 114 of the Penal Code, the altering of which constitutes a felony. On the contrary, it is asserted that register is merely a private record of probate cases which the public administrator is authorized to change at will, and that the defendant merely altered it at the request of that officer. A reversal of the judgment is also sought for alleged errors of the trial court in refusing to give to the jury certain proffered instructions.

[1, 2] The judgment of conviction is adequately supported by the evidence. The record shows that J. R. King, Jr., was the duly elected, qualified and acting public administrator of Butte county. As such officer he maintained a register of probate proceedings, as required by section 1151 of the Probate Code. In 1938, he was engaged in probating three estates of deceased persons, namely, the estates of Estelle Dillingham, Della Tarleton and William Simonton. In his register of probate proceedings, he had entered as required by law the amount of money and property which came into his possession as administrator of those estates, together with the other data of probate proceedings required by the preceding section. The defendant, as the clerk and agent of Mr. King, collected money and took possession of property belonging to those estates, some of which were not accounted for. He had access to the probate register. In November, 1938, he cut out and destroyed one page of the register containing a portion of the record of the Tarleton estate. During the same month he removed and destroyed a part of the probate record of the Dillingham estate, and he erased, changed and reduced the figures showing the cash received in the Simonton estate. He claims to have destroyed or altered, those records at the request of Mr. King. Even though he violated the provisions of section 113 of the Penal Code, by mutilating, destroying, altering and falsifying the records of the public administrator's register at that officer's request, which we do not determine, he would still be guilty as a principal under the provisions of section 971 of the Penal Code. The question of the motive with which the defendant altered and destroyed the records was solely

a problem for the determination of the jury. In effect, the jury found that he did so alter and destroy portions of the record wilfully and feloniously.

[3] The register of probate proceedings which the public administrator is required by law to keep pursuant to section 1151 of the Probate Code constitutes a public record, the mutilation, falsification or destruction of which comes within the inhibitions of sections 113 and 114 of the Penal Code. Section 4181 of the Political Code requires the public administrator to perform the duties imposed upon him by chapter 20, division 3 of the Probate Code. Section 1151 of the Probate Code provides that: "The public administrator shall keep a book, to be labeled 'Register of Public Administrator,' in which he shall enter the name of every decedent whose estate he administers, the date of granting letters, the money received, the property appraised and its value, the proceeds of all sales of property, the amount of his fees, the expenses of administration, the amount of the estate after all charges and expenses have been paid, the disposition of property on distribution, the date of his discharge, and such other matters as may be necessary to give a full and complete history of each estate administered by him."

[4, 5] The public administrator is charged with a trust of vital importance. As a public officer he is entrusted with the administration of estates of deceased persons who have no relatives within the jurisdiction. Sec. 422, Prob.Code; 11B Cal. Jur. 900, sec. 1369; 24 C.J. 1201, sec. 2872. He should be efficient, diligent and scrupulously honest in handling the property and estates entrusted to him. For that reason he is required by law to keep a register of actions in which he must enter all proceedings specified in section 1151 of the Probate Code. He must also render to the probate court every six months a full and true report of all property and proceedings incident thereto, and he must also publish those reports in a newspaper or post them in the office of the county clerk and file them in the estates pending in the probate court. Sec. 1153, Prob. Code. The evident purpose of those sections is to prevent fraud and insure an honest administration of the estates. The evil of permitting wilful alterations of such a public register of probate actions required by law to be kept by the public administrator is apparent. Clearly the wilful mutilation, falsification, alteration or destruction of that probate register comes directly within the inhibitions of sections 113 and 114 of the Penal Code.

Section 113 of the Penal Code provides that: "Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do, is punishable by imprisonment in the state prison not less than one nor more than fourteen years."

The following section, under which the defendant in this case was convicted, reads as follows: "Every person not an officer such as is referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding one hundred dollars, or by both."

[6] There is therefore no fatal variance between the allegations of the indictment and the proof which was adduced. The judgment is supported by the evidence.

[7] The case of Dwinelle v. Henriquez, 1 Cal. 387, upon which the appellant relies, is not in conflict with our theory that the public administrator's register of actions is a public record, the wilful alteration, falsification or destruction of which is punishable by the terms of sections 113 and 114 of the Penal Code. All that case determined is that under the statutes as they then existed a public administrator was personally liable for the payment of compensation to an attorney hired to probate an estate. That was true until section 1619 of the Code of Civil Procedure, now section 910 of the Probate Code, was amended in 1905, p. 727, to allow the attorney to apply directly to the estate for his compensation. The Dwinelle case makes no reference to the probate register of the public administrator required by law to be kept. It does, however, concede that the public administrator is a public officer. There can be no doubt of that fact. Section 4013 of the Political Code includes the public adminis-

trator among the legally enumerated county officers. The public administrator has been definitely held to be a public officer. County of Los Angeles v. Kellogg, 146 Cal. 590, 80 P. 861; Estate of Miller, 5 Cal. 2d 588, 593, 55 P.2d 491. In 21 California Jurisprudence, page 923, section 100, it is said: "A public administrator obtains letters of administration not as an individual, but by virtue of his office." As such public officer the law requires him to keep a register of probate proceedings which is included among the books, documents and records, the wilful alteration, falsification or destruction of which constitutes a felony under the provisions of sections 113 and 114 of the Penal Code.

[8] The court did not err in refusing to give to the jury defendant's proffered instructions numbered 18, 19 and 20. Those instructions were adequately covered by other instructions which were given to the jury in the charge of the court. Defendant's instruction number 18, which was refused, contained four elements. By its terms the jury was charged that the defendant must be acquitted unless they found that, (1) he made the alterations in the administrator's register as charged in each count of the indictment; (2) that the alterations were not made by him "in the ordinary course of business"; (3) that the alterations were false entries in the record, and, (4) that he knew them to be false.

[9, 10] We may assume that alterations in a public record would not violate sections 113 and 114 of the Penal Code unless they are false, and that the accused person knew the alterations were false. If a record is changed in good faith to make an erroneous statement of facts speak the truth, such alteration would lack the criminal intent to violate the provisions of the statute. People v. Tomalty, 14 Cal.App. 224, 229, 111 P. 513. The charge which was given to the jury covered all of the elements of the crime included in the refused instruction. The defendant was acquitted on the first count, and we shall, therefore, not consider the application of the omitted instruction to that portion of the indictment. In instruction number 5, the court specifically charged the jury with respect to each essential detail of the offense of "unlawfully, wilfully, knowingly and feloniously" altering, mutilating, falsifying and destroying portions of the public administrator's probate register. The jury was informed with respect to the second count that the defendant removed, destroyed and secreted page 37 of that book affecting the estate of Dillingham, and inserted in lieu thereof "spurious, incomplete and false written entries" which were known to him "to be wholly false". With respect to the third count, the jury was charged that he did "remove, destroy and secrete" page 23 of the probate record affecting the estate of Tarleton, and inserted in lieu thereof "certain spurious, incomplete and false written entries" which were known by him "to be wholly false". With respect to the fourth count the jury was charged that the defendant "did falsify and alter" page 74 of the probate record affecting the estate of Simonton, by changing the figure representing cash receipts so as to reduce a charge of $199 to the sum of $184.50, and changed another item of $184.50 to the sum of $100; that these alterations were wholly false and known to the defendant to be "false, spurious and untrue". That instruction then charged the jury that "each element of the offenses must be so proved", and that every material allegation of each count of the indictment must be proved by the prosecution beyond a reasonable doubt, or the defendant would be entitled to an acquittal. In instruction number 11 the court specifically charged the jury that "alterations made in the ordinary course of business are not prohibited by the said section 114". It follows that the jury was elsewhere fully charged upon every essential element contained in that refused instruction. For the purpose of this appeal the defendant admitted that he made the alterations and changes in the probate register with which he was charged in the indictment. The refusal to give to the jury defendant's instruction number 18 was neither prejudicial nor erroneous.

Instruction number 19, the refusal of which is assigned as erroneous, was covered by instruction number 11, above referred to, which was given to the jury in almost the exact language contained in the refused instruction.

Instruction number 20, the refusal of which is assigned as reversible error, covers the same points which were included in number 18 which we have previously discussed. It merely informed the jury that the defendant could not be convicted unless the prosecution proved beyond a reasonable doubt that the entries which he made in the probate record were false, and that he knew they were false. For the reasons above assigned, the refusal of this instruction was neither prejudicial nor erroneous.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

35 Cal.App.2d 345

ST. LAURENT v. ST. LAURENT.

Civ. 12286.

District Court of Appeal, Second District, Division 2, California.

Nov. 2, 1939.

1. Divorce ⟹217, 229, 280

An order awarding costs, attorney's fees, and alimony pendente lite in a divorce action was an appealable order which became final 60 days after its entry, and where motion to vacate order was not made until more than 60 days had elapsed, order became "final," and trial court had no jurisdiction to modify order in respect to costs, attorney's fees, and accrued alimony, in absence of a proper showing under statute providing for relief from a judgment or order. Code Civ.Proc. §§ 473, 939.

[Ed. Note.—For other definitions of "Final Order," see Words & Phrases.]

2. Divorce ⟹283

Where notice of appeal from order directing defendant husband in divorce action to pay alimony pendente lite, attorney's fees, and costs was not filed until more than 60 days after entry of order, appeal was dismissed. Code Civ.Proc. § 939.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action for divorce by Lorraine St. Laurent against Joseph A. St. Laurent. From an order of May 31, 1938, directing defendant to pay alimony pendente lite, attorney's fees, and costs, and from an order of August 2, 1938, refusing to vacate the prior order so far as it directed the payment of attorney's fees, costs and accrued alimony, defendant appeals.

Appeal from order of May 31, 1938, dismissed, and order of August 2, 1938, affirmed.

B. F. Tyler, of San Diego, for appellant.

A. T. Molina, of San Diego, for respondent.

McCOMB, Justice.

From (1) an order of the trial court directing defendant to pay alimony pendente lite, attorney's fees, and costs, and (2) a subsequent order refusing to vacate the prior order so far as it directed the payment of attorney's fees and costs, defendant appeals.

The essential facts are:

May 16, 1938, plaintiff filed on action for divorce against defendant alleging that they were married at Yuma, Arizona, November 1, 1931. May 31, 1938, the trial court ordered defendant to pay plaintiff as attorney's fees the sum of $75, as costs the sum of $11, and $25 per month alimony pendente lite. August 2, 1938, defendant made a motion to vacate the prior order, alleging that on November 1, 1931, the date of the alleged marriage between the parties, plaintiff was married to Edward Cartwright, who was alive and from whom she was not divorced. The trial court found these allegations to be true and entered an order relieving defendant from future payments of alimony pendente lite, but denied the motion to relieve the defendant from the payment of attorney's fees, costs, and accrued alimony.

This is the sole question presented for determination:

Was it error for the trial court to refuse to vacate the order of May 31, 1938, so far as the order related to costs, attorney's fees and accrued alimony?

[1] This question must be answered in the negative. The order of May 31, 1938, awarding costs, attorney's fees, and alimony pendente lite was an appealable order (see cases cited in 1 Cal.Jur. [1921] 966, sec. 20, note 20). Therefore, this order became final sixty days after its entry. Sec. 939, Code Civ.Proc. Since the motion, upon which the order now under consideration was based, was not made until more than sixty days had elapsed, the order of May 31, 1938, was final and the trial court was without jurisdiction to modify its prior order in respect to costs, attorney's fees,

and accrued alimony, except upon proper showing pursuant to the requirements of section 473 of the Code of Civil Procedure. In the present case no attempt was made to meet any of the requirements of section 473 of the Code of Civil Procedure. Therefore, the trial court's order was correct.

[2] Since notice of appeal from the order of May 31, 1938, was not filed until more than sixty days after the entry of the order, the appeal from this order is abortive and is dismissed.

The order of August 2, 1938, is affirmed.

I concur: WOOD, Acting P. J.

---

35 Cal.App.2d 361

SECRETO et al. v. CARLANDER et al.

Civ. 12212.

District Court of Appeal, Second District, Division 2, California.

Nov. 3, 1939.

Hearing Denied Dec. 29, 1939.

1. New trial 🔑137

Defendant could not rely for reversal of trial court's ruling on motion for new trial on ground that notice of intention to move for new trial did not contain a statement that motion would be made upon affidavits or the minutes of the court or both, in absence of objection, when motion was submitted, to defects in notice of intention.

2. Appeal and error 🔑270(2)

Where a motion for new trial is argued and submitted without any objection being made to defects in notice of intention to move for new trial, any irregularities therein are waived and may not be urged upon appeal.

3. New trial 🔑161(1)

The trial court may, as a condition for denying a motion for new trial, require the opposing party to consent to an increase of the amount of the verdict, to make the amount conform to the evidence.

4. New trial 🔑75(1)

The trial court may, on motion for new trial, if it believes the amount awarded inadequate or not commensurate with extent of injuries received, grant the motion on ground that the evidence does not justify the verdict. Code Civ.Proc. § 657.

5. New trial 🔑163(1)

If, in passing upon motion for new trial, the trial court's language is susceptible of being interpreted as tantamount to granting new trial for insufficiency of evidence, the exact language set forth in statute need not be used and language bearing the same import is sufficient. Code Civ.Proc. § 657, subd. 7.

6. New trial 🔑163(1)

An order, granting plaintiff's motion for new trial unless defendants consented to an increase in the amount of the verdict in personal injury action, was sufficient as a grant of new trial on ground of insufficiency of the evidence, though it did not specify in words of statute that it was granted upon such ground. Code Civ.Proc. § 657, subd. 7.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action for damages by Lois Jean Secreto, a minor child, by Pearl Secreto, her guardian ad litem, and others, against Roy J. Carlander and others. From an order granting a motion by the named plaintiff for new trial unless defendants should consent that verdict and judgment of the jury in the sum of $150 be increased to $1,200, the named defendant appeals.

Affirmed.

George L. Greer and James V. Brewer, both of Los Angeles, for appellant.

Don S. Irwin, of Los Angeles, for respondent.

McCOMB, Justice.

From an order granting plaintiff Lois Jean Secreto's motion for a new trial unless defendants consented that the verdict and judgment of the jury in the sum of $150 be increased to $1,200, defendant Carlander appeals.

These are the essential facts:

A jury returned a verdict in favor of plaintiff Lois Jean Secreto in an action for damages in the sum of $150. Plaintiff filed a notice of intention to move for a new trial, reading as follows: "To the Above Named Defendant, Roy J. Carlander, and to George L. Greer, His Attorney:

"You and each of you are hereby notified that the above named plaintiffs, Lois Jean Secreto, a minor child, by Pearl Secreto, her guardian ad litem. Pearl Secreto and James Secreto, intend to move the above entitled court for its order vacating and setting aside the decision and/or judgment of said court rendered and entered in the above cause and/or for its order granting to said plaintiffs a new trial of said cause.

"Said motion will be made for the following causes materially affecting the substantial rights of said plaintiffs, to-wit:

"1. Irregularity in the proceedings of the court by which plaintiffs were prevented from having a fair trial;

"2. Orders of the court by which plaintiffs were prevented from having a fair trial;

"3. Abuses of discretion by which plaintiffs were prevented from having a fair trial;

"4. Insufficiency of the evidence to justify the verdict;

"5. That the verdict is against law;

"6. Accident or surprise which ordinary prudence could not have guarded against.

"7. Errors in law occurring at the trial and excepted to by the plaintiffs.

"8. That the damages awarded plaintiffs were inadequate to compensate for the injuries and damages indisputably proven.

"Don S. Irwin
"Don S. Irwin
"Attorney for plaintiffs"

Thereafter on January 27, 1939, after hearing the arguments on the motion for a new trial, the trial court made an order, the material part of which reads as follows: "* * * If defendant files a written consent that the Verdict and Judgment on behalf of the minor Lois Jean Secreto, be amended so as to award said plaintiff $1200.00 instead of $150.00, the motion for a new trial will be denied; otherwise the motion will be granted."

Defendant Carlander relies for reversal of the order of the trial court in ruling on the motion for a new trial on these propositions:

First: The trial court was without jurisdiction to grant a new trial, for the reason that the notice of intention to move for a new trial did not contain a statement that the motion would be made upon affidavits or the minutes of the court or both.

Second: The trial court is without power in ruling upon a motion for a new trial to increase the amount of a jury award of damages, in the absence of the consent of both parties.

Third: The order granting the motion for a new trial did not specify that it was granted upon the ground of the insufficiency of the evidence to justify the verdict, if such be the reason, as required by section 657 of the Code of Civil Procedure. Therefore it must be presumed that the order was granted upon some other ground.

[1, 2] The first proposition will not be considered by us, for the reason that the law is established in California that, where as in the instant case, a motion for a new trial is argued and submitted without any objection being made to defects in the notice of intention to move for a new trial, any irregularities therein are waived and may not be urged upon appeal. Christy v. Spring Valley Water-Works, 68 Cal. 73, 8 P. 849; Cormond v. United Railroads, 41 Cal.App. 683, 686, 183 P. 218; Starkweather v. Eddy, 196 Cal. 73, 75, 235 P. 334.

[3] The second proposition is untenable. The law is established in this state that as a condition for denying a motion for a new trial the trial court has the power to require the opposing party to consent to an increase of the amount of the jury's verdict to bring the amount of the verdict in conformity with the evidence. Adamson v. County of Los Angeles, 52 Cal.App. 125, 131, 132, 198 P. 52.

[4] The final proposition is likewise without merit. It is settled that in an action for damages for personal injury a trial court on a motion for a new trial has the power, if the judge believes the amount awarded by the jury is not adequate under the evidence or commensurate with the extent of the injuries received, to grant a motion for a new trial on the ground that the evidence does not justify the verdict. Taylor v. Northern Electric R. Co., 26 Cal.App. 765, 767, 148 P. 543.

[5] It is also the law of this state that, if in passing upon a motion for a new trial, the language used by the trial court in its order is susceptible of being interpreted as tantamount to granting a new trial on account of the insufficiency of the evidence, it is unnecessary to use the exact language set forth in subdivision 7, section

657 of the Code of Civil Procedure, and that language used in the order bearing the same import and conveying the same idea as the specific language set forth in the code section is sufficient. Lucerne Country Club v. Beal, 21 Cal.App.2d 121, 126, 68 P.2d 408.

[6] Applying the foregoing rule to the order in the instant case, from an examination of the order, it is clear that the reason the trial court granted the motion for a new trial was because he believed the verdict was not adequate to compensate the plaintiff Lois Jean Secreto for the injuries she had received in view of the evidence. This is apparent from the fact that the trial judge included in his order an alternate provision or condition which increased the amount of damage and if consented to by defendant Carlander would result in a denial of the motion for a new trial. Had the order been based on any of the other grounds stated in the notice of intention to move for a new trial, it would of necessity have required the granting of the motion, even though defendant Carlander consented to an increase in the amount of the jury's award.

For the foregoing reasons the order is affirmed.

I concur: WOOD, Acting P. J.

Mr. Presiding Justice MOORE being disqualified does not participate in this decision.

---

35 Cal.App.2d 290

PEOPLE v. HANKS.

Cr. 525.

District Court of Appeal, Fourth District, California.

Oct. 27, 1939.

Hearing Denied Nov. 22, 1939.

1. **Criminal law 🔑511(2)**

In prosecution for attempt to commit arson and conspiracy, evidence as to impoverishment of accused, amount of insurance carried by him, finding of inventory of contents of building in automobile of accused, lack of motive of accomplice, and probable motive of accused, coupled with admitted fact that accused ordered gasoline by which it was sought to ignite building, was sufficient to corroborate testimony of accomplice and to connect accused with commission of the offenses. Pen.Code, § 1111.

2. **Criminal law 🔑508(9)**

The testimony of accomplice with respect to participation of accused in alleged crime was not unworthy of belief because accomplice had been induced to testify before the grand jury of his own participation in the crime.

3. **Criminal law 🔑508(9)**

The testimony of accomplice was not rendered unworthy of belief by his admission that he had been previously convicted of a felony, but the jury had right to believe or disbelieve him.

4. **Criminal law 🔑964**

When an order has been made either granting or denying an application for new trial in a criminal case, the only remedy for party deeming himself aggrieved is an appeal from the order, since the court may not entertain a subsequent motion to change or vacate the order.

5. **Criminal law 🔑1023(2)**

An order dismissing motion for leave to renew motion for new trial, in a criminal case, is not an "appealable order."

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

6. **Criminal law 🔑997**

The writ of coram nobis is not available to secure new trial on ground of newly discovered evidence.

7. **Criminal law 🔑964, 997**

A motion for leave to renew motion for new trial or in the alternative for a writ of coram nobis should have been dismissed.

8. **Criminal law 🔑957(3)**

An affidavit by a juror, reiterating the substance of charges set forth in affidavit theretofore filed by accused with respect to alleged misconduct of another juror, would be disregarded, since jurors may not impeach their own verdict.

9. **Criminal law 🔑911, 1156(1)**

A motion for new trial is addressed to the trial court's sound discretion, and its action will not be disturbed on appeal unless the discretion is clearly and unmistakably abused.

10. Criminal law 🔑956(13)

Where affidavits filed by accused in support of motion for new trial alleged that one of jurors was biased and prejudiced before juror was selected and had so expressed himself, but juror in his affidavits denied that he was biased or prejudiced and denied having made the statement attributed to him, denial of motion, to extent that it was based on such ground, was not an abuse of discretion.

11. Criminal law 🔑719(1), 1037(2)

The district attorney was not authorized to supply evidence of facts not appearing in the record, but where argument and statement involved could have had no particular bearing on guilt of accused, and no objection to argument was made at the time and no request made that jury disregard it, accused could not complain thereof on appeal.

12. Criminal law 🔑1171(3)

The district attorney in remark to jury should have made no reference to statement which was not in evidence, but, where accused had admitted on cross-examination that he might have made the statement referred to, the reference thereto by district attorney was not prejudicial.

13. Criminal law 🔑722(3), 1171(6)

District attorney's remark that accused did not have any halo over his head and had never been donated any medal for being an outstanding citizen was not entirely proper, but, where evidence showed that accused was and had been engaged for some time in an unlawful enterprise, the remark was somewhat justified and was not prejudicially erroneous.

14. Criminal law 🔑1171(1)

The practice of prosecuting attorneys of becoming overzealous in securing convictions is not commended, but courts are strongly inclined against setting aside convictions on the ground of misconduct of district attorneys alone.

15. Criminal law 🔑1171(1)

The misconduct of a district attorney is not ground for reversal of a conviction when it is unimportant or slight or when it cannot prejudice accused or when verdict could not have been controlled or affected thereby.

16. Criminal law 🔑713

The conduct of a district attorney must reach a course of proceeding militating against justice and the fair and orderly conduct which should characterize a judicial proceeding in a criminal case before error can be predicated thereupon.

17. Criminal law 🔑730(1), 1154

Each case must be judged by its own particular circumstances and much must be left to the trial court's discretion in determining whether an attorney has overstepped the bounds of legal propriety in his conduct of the trial, and its judgment that counsel's conduct was not prejudicial will not be set aside unless the contrary clearly appears.

18. Arson 🔑37(1)
Conspiracy 🔑47
Criminal law 🔑925(1)

Evidence sustained conviction on charge of conspiracy to commit arson as well as on charge of attempt to commit arson, hence the District Court of Appeal would conclude that the trial court did not abuse its discretion in denying motion for new trial on ground of misconduct of a juror.

◆

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Chris Hanks was convicted of attempt to commit arson and conspiracy to commit arson, and he appeals.

Affirmed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Frank Curran, of Fresno (Matt Goldstein, of Fresno, of counsel), for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

GRIFFIN, Justice.

Appellant Chris Hanks and one Milton J. Pemble were indicted for the offenses of arson and conspiracy to commit arson. Pemble entered a plea of guilty to the offense of attempt to commit arson and testified against appellant. Appellant was convicted of attempt to commit arson and conspiracy. This appeal is taken from the final judgment of conviction and from the order denying the appellant's motion for a new trial.

Subsequent to the denying of the motion for new trial appellant filed a "notice of motion for leave to renew his motion for a new trial, or in the alternative for a writ of coram nobis". This motion was dismissed by the court for lack of jurisdiction, from which an appeal has been taken.

The points relied upon by appellant for a reversal of the judgment and order denying his motion for new trial are misconduct of a juror, insufficiency of the evidence, and misconduct of the district attorney.

Appellant owned the Hanks' cafe, located at 1833 Tulare street in the city of Fresno. The establishment was divided by partitions into three compartments, namely, a lunch counter, bar, and gambling room, under which was a spacious basement. Appellant permitted Pemble to operate the lunch counter for what he could make out of it, free of rent for use of the space and equipment which was owned by appellant. He leased the bar to a Dan McDonald at a rental of $4 a day. Appellant personally conducted the gambling department in the remaining portion of the storeroom. The testimony indicates that before gambling was closed by the mayor of the city in September, 1938, the place earned considerable profits, but thereafter the profits gradually decreased. McDonald stopped paying rent on the understanding that when times picked up appellant and he would agree upon the rent to be paid until he could pay the regular rental. In 1937 and 1938 appellant maintained insurance on the equipment in the amount of $6,000, which on December 18, 1938, was increased to $7,000 upon adding more equipment, which insurance was in effect on the 6th day of April, 1939, the day of the fire hereinafter mentioned. On February 24, 1939, seven weeks before the fire, the premium of $214.20 was paid on the policies. About three weeks before the fire, appellant and J. L. Burns, a card dealer in the establishment, took an inventory of the property in the place. It was stipulated that the *cost price* of the equipment was about $9,495.65. Appellant, at the time of the fire, was indebted to several creditors in Fresno for equipment, loans, gas and light bills, and nine months' back rent on the cafe at $100 per month, all totaling about $2,500. The profits that appellant had made from the establishment had been put into clubs in Madera county in which he was interested. He also had removed some of the chairs, tables and poker chips and had taken them to these clubs. Shortly before the fire, appellant ordered J. R. Hatfield, who worked with Pemble in the restaurant, to secure some gasoline for appellant in a gallon jug which jug appellant obtained from McDonald. Hatfield, upon returning with the jug of gasoline from a near-by Richfield station, set it down at the kitchen door as directed by appellant. It was then carried downstairs by one Jimmie Hixon, at appellant's request, and placed by him on the table. Appellant claims he was going to use the gasoline in connection with the painting work that was being done on his boat. At about 5:25 o'clock on the morning of April 6, 1939, police officers, while passing the alley by Hanks' cafe in their car, detected the odor of smoke. Upon investigating the premises, they discovered that the window in the side door to the alley had been broken and that all the doors were closed except the door to the alley. They then notified the fire department. The fire marshal responded to the call and found smoke in the basement and evidence of a set fire. It appeared also that a burglary had been committed. Fires had been started in about 28 different places. They were set on the stringers of the beams underneath the floors, in the basement. A paper cup with gasoline in it was used in the majority of cases and they had all burned except four. The fire had eaten into the wood in several different places. There was gasoline in the cups that had not burned and also in a jug. The amount of gasoline remaining in the jug and the amount used in the cups, taken together, was sufficient to have destroyed the building but the building had not burned completely because the fires had not enough body to them. They were of short duration and acted more or less like powder. The marshal found shavings under certain holes that were bored in the floor of the building. He also identified a pinch bar as having first been seen by him in the basement near some whiskey cases. He also found a broken-open money box and three keys near-by. The stick used to light the fires was found in the basement. The safe in the office was open and the drawers were pulled out. However, the money was not kept in the safe but in a tin box called the chip drawer. Pemble knew where the money was kept.

Pemble, the accomplice, testified that he had been convicted of a felony and served a term in a penal institution therefor; that he had known appellant since the early part of 1936; that he operated the cafe for about three months; that he was frequently with appellant and that since gambling closed on the 20th day of September, 1938, there hadn't been a great number of people coming in there; that about four weeks before the fire he had a conversation with appellant with reference thereto; that this conversation took place in the kitchen near the lunch counter and that then the appellant asked him what he would do for $200; that he then said: "Well, I don't know, Chris. That would depend a great deal. There are things I would do for $200. However, I am a good listener"; that appellant did not make any real proposition at that time but asked him if he would go riding with him that evening and on that evening they went to some gambling place; that he and defendant were alone in the car and that while they were riding appellant approached him on the subject of burning the building; that appellant asked him if he would consider burning the building for a consideration of $250, and he told appellant that he would; that appellant said that there was another party he could get and wanted to know if he would go through with it; that if he would not, there was time enough to back out, and that he could get someone else; that he told appellant that he would go ahead with it; that at another time, while at appellant's home, appellant was in his garage burning a liquid in a little glass dish and that later that evening he discussed with appellant the method that was to be used in setting the fire; that he told appellant how he wished to do it and that was by piling up the tables and chairs downstairs and placing loose papers around them and burning them in possibly six or eight different places; that appellant said "No, it must not be done that way"; that he told him it must be done with wax paper cups, possibly thirty or more, and put in certain places, and that he (Pemble) was to put gasoline in the cups and then light them; that this conversation took place about two weeks before appellant intended to leave the city; that appellant told him that a burglary must be committed to make it appear as an "outside job"; that he was given a key to the front door, possibly ten days or two weeks before the fire, which was after arrangements had been made for the setting of the fire; that he did not have a key up to that time; that the safe was not locked and he was to practice on it until he learned the combination, and that appellant gave him the combination to the safe, which was written down on a piece of paper and handed to him, which he memorized.

After his arrest Pemble recited the combination of the safe to an officer. Pemble further testified that in the conversations he had with appellant, a time was mentioned when the fire should be set, which was to be after three o'clock in the morning; that he knew when appellant left town; that the fire was to be set while appellant was away; that about three weeks before the fire, appellant and he bored holes in the floor, possibly a dozen holes, and that was done sometime after 12 o'clock midnight after the place was closed; that the holes were bored with a brace and bit and that he had not seen the bit before but had seen the brace from time to time; that he did the drilling and the appellant was with him at the time; that they first took a ride in the automobile and later returned and entered the place; that appellant mentioned that the holes were to be bored to create a draft; that the paper cups were brought there by appellant and that there were about 30 in number; that the gasoline had been left down there near a table but that he did not know when it was brought there and that appellant had told him that it was taken down there and was in a gallon wine jug; that he had a conversation with appellant with reference to where the cups should be placed and was shown where to place them in the basement; that they were to be placed on the stringers as described; that he did not get any equipment himself for the purpose of starting the fire except a pair of gloves; that appellant bought a pair of gloves one day but he could not use them because they were too small and in bad shape; that he then went and bought gloves himself; that he did not have any equipment in the place himself and all dishes and all the utensils belonged to appellant; that he had no insurance of any kind and that his only capacity there was to make what he could out of the cafe; that one Saturday afternoon when appellant left on a trip, he had been given a key to the place and was instructed to get into the safe and obtain a little metal box where the money was kept; that appellant gave him a little bar to open it, and that he used the bar in his work; that on the night before the fire he left the place not later than 12:15 o'clock, and that appellant had returned from his trip at the time and inquired as to why he had not set the fire while he was gone; that he told appellant that he could not, "that he couldn't get clear so he wouldn't be seen and recognized"; that it was not over two days after appellant returned to Fresno that the fire occurred; that on the morning of the fire he entered shortly after the place was closed; that he had made preparations prior thereto to get in and had thrown the bolt back on the east rear door and also had thrown the hasp back on a wide door that led in from the alley; that he then left the place with McDonald and Burns and one other party; that he returned about 15 minutes later and went directly to the alley door where he had thrown the wide door open, and closed it and threw the hasp back so no one could enter from the outside; that he entered the building through the east rear door and that he took the key and unlocked the padlock that leads out into the alley on the west side and obtained the keys for the metal box, as he had been shown where they were; that he then used the bar and pried open the drawers and took about $15 or $20 from the box; that shortly after he entered the place he prepared the cups and that the cups were in a paper sack in the ice box; that the jug of gasoline was in the basement by one of the tables and that he filled about 30 of the cups with gasoline and placed them on the beam, and in three places on rock pillars and then set them on fire with a stick on which there was some striped material, like mattress or tick material; that he knew that he had overlooked two of the cups but could not turn back to light them because it was getting too hot in there, so he went up through the cellar door and out the alley; that he broke the glass in the door and threw the padlock across the alley and went directly to his room, hid the gloves and the key and washed his hands; that appellant had told him to throw the key away and about two days later, on the way through the tunnel leading from Fresno and H streets, he pitched it on the rock wall on the left-hand side; that on the next evening he went to appellant's home and in the presence of a Mrs. Hart he expressed regrets that anything like that had been done, and that later that evening, while riding with appellant, they had a conversation with reference to the matter, at which time appellant told him he was going to get him a lawyer; that on the morning he was arrested appellant gave him $10 and told him that it would "get him by up at Fish Camp until he could get something to do"; that he was arrested before he was able to get away to Fish Camp.

Fire Marshal L. A. Moore, after having a conversation with Pemble, had occasion to go and search for a key at the subway. The key was found and with it the fire marshal opened the front door of appellant's cafe. Appellant admitted in his presence that he had moved some chairs and tables to a place just outside the city of Fresno.

J. R. Hatfield, a witness for the People, testified that he was employed at the cafe, and that on the night before the fire, when McDonald and Pemble were leaving the cafe and got almost to the door, Pemble said: "I forgot", and went back to the kitchen and was gone for about a minute before he returned.

S. A. Meek, detective sergeant, testified that he found an inventory of the property located in the cafe building, a gun and other things in appellant's automobile on the day of the fire.

Appellant Hanks denied any conversation with Pemble relating to the conspiracy; denied that his debts were large or unusual; admitted that he owed his landlord nine months' rent, but pointed out that on a previous occasion he had owed him eight months' rent. He denied any knowledge of or participation in the alleged conspiracy to burn down the establishment and further testified that he had been making a profit out of the establishment even after the public poker games were closed down by the police department.

Mrs. Hart, a lady friend of appellant, testified that she had been approached by Pemble, who had been quite attentive to her, to go with him to Utah and live while he developed a gold mine which he claimed he had discovered there.

Pemble admitted this fact in substance. No one except Pemble testified with respect to any of the conversations giving rise to the alleged conspiracy. There was testimony by witnesses with respect to the purchase of a gallon of gasoline at a Richfield station near Hanks' Cafe, which was admittedly made at the request of Hanks.

Appellant strenuously maintains that the evidence, independent of the testimony of the accomplice, was not corroborated by other evidence tending to connect the appellant with the commission of the offense, and in this connection also argues that the witness Pemble was so unreliable and untrustworthy that his testimony was unworthy of belief, citing section 1111, Penal Code; People v. Kempley, 205 Cal. 441, 271 P. 478; People v. Robbins, 171 Cal. 466, 154 P. 317; People v. Davis, 210 Cal. 540, 293 P. 32; People v. Taber, 13 Cal. App.2d 27, 55 P.2d 1189, and other similar cases.

Appellant admitted the episode where Pemble claimed that appellant burned some liquid in a glass dish in his garage for the purpose of testing its effect and accounts for it in the following manner: That he was testing benzine to determine why it would not start the engine in his boy's airplane. Appellant also admitted that Pemble came to his home on the night of the fire or the next day, and conversed with him. He stated that on the day before Pemble was arrested he gave him one dollar for the purpose of buying napkins, but did not give him ten dollars as claimed by Pemble. Appellant further admitted taking a trip shortly before the fire. He denied ever giving Pemble the combination to the safe.

Pemble was called before the grand jury and testified prior to the return of the indictment. From the record it appears that there was some evidence bearing on the inducement of the accomplice Pemble to there testify of his participation in the crime. He admittedly had been previously convicted of a felony. He testified that some person connected with the fire department consulted him regarding going before the *grand jury* and admitting that he had set the fire, and testified that "they told me that I may not go to San Quentin" and that "it would be easier for me if I told" and "I believed I could get out of it lighter", and acting on what they said he stated that he went before the grand jury and testified that *he had set the fire.*

Appellant further argues in this connection that Pemble had a motive in endeavoring to try to fasten the crime on appellant, due to the fact that Mrs. Hart, who was Hanks' "girl", was also the object of Pemble's affections and that he admittedly tried to induce her to give up Hanks and go with him to an alleged gold mine in Utah. It is therefore claimed that his testimony, which connected appellant with the commission of the offense, was actuated not only by jealousy but also by the claimed promise of leniency.

It is to be further noted that after Pemble was committed to the state's prison and after the court denied the motion for new trial, in a letter dated June 9, 1939, directed to counsel for appellant, Pemble claimed that he had made unfair statements against appellant due to certain facts therein related. On June 20, 1939, Pemble made and thereafter appellant attempted to present an affidavit exonerating Hanks and assuming the entire responsibility. This affidavit was presented after the court denied a motion for new trial and after the notice of appeal was given, upon a motion dated June 21, 1939, entitled "Motion for Leave to Renew Motion for New Trial or in the Alternative for a Writ of Coram Nobis", which said motion was dismissed for lack of jurisdiction of the court to act in the matter on the date presented.

[1] We will first dispose of the question of the sufficiency of the evidence to warrant the conviction. Appellant likens the witness Pemble to the witness Agnes Keller, in People v. Kempley, supra, where the judgment was reversed by the Supreme Court on the ground of the insufficiency of the corroborative evidence to prove the corpus delicti of the offense. The corpus delicti in the instant case on the charge of attempt to commit arson was unquestionably proved by evidence independent of the testimony given by the witness Pemble, which was not the case in People v. Kempley, supra, where the defendant was convicted of soliciting and accepting a bribe. Therefore, in the instant case, on the charge of attempt to commit arson, we are confronted only with connecting the appellant with the commission of the crime by evidence other than the testimony of the accomplice. The circumstance of the impoverishment of the appellant, the amount of insurance carried, the finding of an inventory of the contents of the building in appellant's car, the lack of motive of Pemble, and the probable motive of appellant to burn the building, together with the corroborative circumstances heretofore related and the admitted fact that appellant ordered the gasoline by which the building was attempted to be ignited, in our opinion, are facts sufficient to corroborate the testimony of the accomplice, and to connect the appellant with the commission of the offenses of which he was accused. The jurors accepted the entire testimony and under correct instructions, passed upon its weight and the credi-

bility of the witnesses who gave it. Its weight and the credibility of the witnesses were again passed upon by the trial court on a motion for a new trial, which was denied. We find no legal ground for disagreeing with the court and jury. People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951; People v. Negra, 208 Cal. 64, 280 P. 354; People v. Armstrong, 114 Cal. 570, 46 P. 611; People v. Davis, supra; People v. Nikolich, 93 Cal.App. 356, 269 P. 721. In fact, the corroborative evidence is much stronger than is to be found in some of the cases above cited, where the court held it to be weak and meager and yet confirmed the conviction.

[2, 3] It should be noted that any claimed inducement held out to Pemble was in regard to *Pemble's admission of guilt before the grand jury.* The record does not disclose any evidence of a promise of leniency if he would testify at the trial against the appellant herein. Standing alone, we are not inclined to attach a great amount of significance to this complaint after the trial court had fully considered it on the motion for a new trial. Notwithstanding the accomplice may have been impeached by his admission that he had been previously convicted of a felony, the jury had the right to believe or disbelieve the witness. People v. Putnam, 129 Cal. 258, 61 P. 961.

[4, 5] We next approach the ruling of the court on appellant's "Motion for Leave to Renew Motion for New Trial or in the Alternative for a Writ of Coram Nobis". Appellant apparently has abandoned his appeal from the order dismissing this motion because he does not argue the same in his brief nor does he cite authorities supporting the merits of his appeal from this order. He attempts, however, to make use of the affidavits filed in connection therewith, in his argument on appeal from the order denying his motion for new trial. The appeal from the order dismissing his motion for leave to renew his motion for a new trial is without legal merit. It is well settled in this state that once a motion for a new trial has been ruled upon in a criminal case and an order made either granting or denying such application, the only remedy for the party deeming himself aggrieved is by an appeal from such order, for the court is without authority to entertain a subsequent motion the object of which is to change or vacate its former order. People v. Paysen, 123 Cal.App. 396, 399, 11 P.2d 431, and cases cited.

[6, 7] In reference to the writ of coram nobis based on newly discovered evidence, the cases of People v. Mooney, 178 Cal. 525, 174 P. 325, and People v. Paysen, supra, clearly establish the law that the trial court had no jurisdiction to entertain the motion at the time presented and upon the ground stated. See, also, 8 Cal.Jur., sec. 496, p. 480, and cases cited; Humphreys v. State, 129 Wash. 309, 224 P. 937, 33 A.L.R. 84; Asbell v. State, 62 Kan. 209, 61 P. 690. The motion for leave to renew the motion for new trial or in the alternative for a writ of coram nobis should have been dismissed.

[8-10] As to the claimed misconduct of a certain juror, appellant believes that the court erred in denying his motion for a new trial predicated on this ground because of the serious charges made against one of the jurors. Appellant filed four affidavits in support of his motion. Three affidavits were filed on behalf of the People denying the truth of the charges contained in the appellant's affidavits. The court after due consideration denied the motion. The substance of the charges contained in the affidavits filed by appellant is that one of the jurors was biased and prejudiced against the appellant before the juror was selected and had so expressed himself. The juror, in his affidavits, denied that he was biased or prejudiced and denied having made the statements attributed to him. At the time of the hearing of the motion, the appellant filed a further affidavit made by another juror, one of the 12 jurors who rendered the verdicts, reiterating the substance of the charges set forth in the affidavits theretofore filed by appellant, which affidavit must be disregarded because jurors are not permitted to impeach their own verdict. People v. Maggio, 90 Cal.App. 683, 266 P. 813. We have examined the affidavits in full and are convinced that only a conflict of evidence was presented which the trial court resolved against the appellant. There appears no abuse of discretion. It is an elementary principle of law that a motion for a new trial is addressed to the sound discretion of the trial court and its action will not be disturbed on appeal except in an instance manifesting a clear and unmistakable abuse of such discretion. People v. McCord, 15 Cal.App.2d 136, 59 P.2d 587; People v. Bispham,

26 Cal.App.2d 216, 79 P.2d 166; People v. Swanson, 24 Cal.App.2d 544, 75 P.2d 623.

[11] Appellant next assigns as error certain remarks made by the district attorney in his argument to the jury one of which related to the district attorney's personal knowledge of certain facts pertaining to the employment of an attorney for appellant. While there was some evidence on the subject, the district attorney had no legal authority to supply evidence of facts not appearing in the record. However, the argument and statement involved could have had no particular bearing on the innocence or guilt of the appellant. No objection to the argument was made at the time and no request was made to the jury to disregard it. Under such circumstances, appellant is not now in a position to complain. People v. Carson, 49 Cal.App. 12, 17, 192 P. 318.

[12] Appellant next complains of the remark by the district attorney to the jury that "He (Hanks) borrowed $100 despite that fact to take this trip, and it is in the statement that we took, to take this trip out here when this place was supposed to be burned." There was no statement taken by the district attorney received in evidence. Therefore, no reference should have been made to it. However, appellant admitted on cross-examination, when asked if he did not tell "us" at the time he was questioned on the 6th day of April about having borrowed $100 to make the "trip", that he might have said it. Therefore, whether the statement was placed in evidence, assuming that a written statement was taken, it is of no moment and the reference to such statement, under the circumstances, was not prejudicial.

[13] Appellant next argues that the following remarks by the district attorney constituted error: "Oh, he (Curran) has called that man a lot of names. But Chris Hanks, you haven't any halo over your head. Chris Hanks, you never had a halo over your head. You have never been donated any medal for being an outstanding citizen in this county or any other county." Appellant objected to the remark on the ground that the district attorney was going outside of the record. We think the remark was not entirely proper, but in view of the evidence in the case showing that appellant was engaged and had been engaged for some time in an unlawful enterprise, there was some justification for the remark and it was not prejudicially erroneous.

[14-18] We have examined the other remarks to which complaint has been directed. No objection was made thereto at the time or there was some evidence supporting the inferences drawn therefrom. While we refrain from commending the practice of prosecuting attorneys becoming over-zealous in securing convictions, courts are strongly inclined against setting aside convictions on the ground of misconduct of district attorneys alone. Such misconduct, therefore, is not a ground for reversal when it is unimportant or slight, or when it cannot prejudice the defendant, or when it appears that the verdict could not have been controlled or affected by it. Counsel's conduct must reach a course of proceeding militating against justice and the fair and orderly conduct which should characterize a judicial proceeding in a criminal case before error can be predicated upon it. Each case must be judged by its own particular circumstances, and much must be left to the discretion of a trial court in determining whether an attorney overstepped the bounds of legal propriety in his conduct of the trial, and its judgment that counsel's conduct wrought no prejudice will not be set aside unless the contrary clearly appears. People v. Mayes, 113 Cal. 618, 45 P. 860; People v. Ruef, 14 Cal. App. 576, 114 P. 48, 54; People v. Owens, 132 Cal. 469, 64 P. 770; People v. Warner, 147 Cal. 546, 82 P. 196. After a careful reading of the entire record, from the facts related and for the reasons expressed we are convinced that there was sufficient evidence as found by the jury under proper instructions given, to hold that the jury was justified in returning a verdict of guilty on the charge of conspiracy to commit the offense of arson, as well as the charge of attempt to commit arson. We therefore conclude that the trial court did not abuse its discretion in denying appellant's motion for new trial on the ground of misconduct of the juror; that there was sufficient corroborative evidence in the case to meet the requirements of section 1111 of the Penal Code; and that the remarks of the district attorney in his argument to the jury were not prejudicially erroneous.

The judgment and order denying the motion for a new trial and the order dismissing the appellant's motion for leave to renew his motion for a new trial or for a writ of coram nobis are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

---

35 Cal.App.2d 319

PEOPLE v. GRIMES et al.

Cr. 1691.

District Court of Appeal, Third District, California.

Oct. 31, 1939.

1. Criminal law 🔑1023(2)

Under statute governing criminal appeals, there is no appeal from an order denying a motion for judgment notwithstanding verdict, nor from an order denying directed verdict for defendants. Pen.Code, § 1237.

2. Criminal law 🔑1023(2)

Appeals from judgments of conviction and from orders denying motions for directed verdict, for judgment notwithstanding verdict, and for new trial, would be considered as being from final judgments of conviction and from orders denying motions for new trial. Pen.Code, § 1237.

3. Criminal law 🔑566

Identification of defendants by victims and other evidence *held* to authorize conviction of kidnapping, notwithstanding some evidence of alibi. Pen.Code, §§ 207, 209.

4. Criminal law 🔑1159(2)

An appellate court has no power to set aside verdict unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support it.

5. Criminal law 🔑1144(13)

The reviewing court must assume in favor of verdict or decision the existence of every fact which jury or judge could have reasonably deduced from the evidence, and then determine whether guilt is deducible therefrom.

6. Criminal law 🔑1202(3)

Defendant's admission that he pleaded guilty to violation of statute providing that person selling mortgaged property is guilty of larceny sufficiently showed prior conviction of felony, where defendant's further testimony showed that the mortgaged property consisted of 350 turkeys mortgaged for $750, in view of statutes providing that taking of domestic fowls worth more than $50 constitutes grand theft which is a felony. Pen.Code, § 487, subd. 1; §§ 489, 538.

7. Kidnapping 🔑1

In statute penalizing kidnapping as intent to exact money or valuable thing from the relatives or friends of victim, the word "relative" is not used in a technical sense, but in its generic sense, which includes every relation that arises in social life, and means a relation in general, so as to include relationship by blood or affinity. Pen.Code, § 209.

[Ed. Note.—For other definitions of "Relation; Relative," see Words & Phrases.]

8. Kidnapping 🔑4

Under indictment charging the kidnapping of woman with intent to extract money and other valuables from her "relatives and friends," proof that demand was made only upon victim's husband did not show fatal variance. Pen.Code, § 209.

[Ed. Note.—For other definitions of "Friend," see Words & Phrases.]

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Robert Grimes and Ollen Grimes were convicted of kidnapping, and they appeal.

Affirmed.

Richard H. Fuidge, of San Francisco, for appellant Ollen Grimes.

Erling S. Norby, of Marysville, for appellant Robert Grimes.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

Mr. Justice TUTTLE delivered the opinion of the court.

Defendants were each charged, in two counts of an indictment, with,—

(1) Kidnaping, under the provisions of section 207 of the Penal Code; and

(2) Kidnaping, with intent to extort money, under the provisions of section 209 of the Penal Code.

[1, 2] They were tried jointly before a jury in the county of Sutter, and each was convicted upon both counts. Each defendant moved for a directed verdict, for judgment notwithstanding the verdict, and for a new trial, all of which motions were denied. Upon the same record each appeals from the judgment of conviction, and from the orders denying their respective motions. Under the provisions of section 1237 of the Penal Code there is no appeal from an order denying a motion for judgment notwithstanding the verdict, nor is there any appeal from an order denying a directed verdict in favor of the defendants. The appeal will be considered as being one from the final judgment of conviction, and from an order denying a motion for new trial.

Taking up first the appeal of Robert Grimes, it is urged that the evidence is insufficient to sustain the conviction. The basis for this contention rests to a great extent upon the fact that defendant's evidence of an alibi was not controverted by any substantial evidence, and that the only reasonable construction that could be placed upon the evidence is that this defendant was not present at the scene of the crime when it was committed, and it was therefore the duty of the jury to acquit him. The determination of this question necessarily involves an examination and close scrutiny of the evidence.

W. R. Meeks and his wife, Mrs. Norma Meeks, resided on a ranch at Rio Oso, Sutter county, California. On the evening of September 1, 1938, they were in their home engaged in playing cards with a few friends. After these friends left the house, and at about 11:30 o'clock, Mrs. Meeks was seated at a card-table working on some account books connected with the administration of the ranch. After she had been working a few minutes, she looked up and saw two men in the entrance between the living-room and the dining-room. One man was standing near the door, and the other was standing near the opening into the dining-room. The man who stood near the door had a gun in his hand, which was pointed toward her. The faces of both men were covered with a material of light color, from the eyes down. The man with the gun wore a white cap. They commanded Mr. and Mrs. Meeks to lie on the floor face down, and the order was complied with. The men stated that if there was any noise made they would shoot. One of the men came from the back of the house carrying some white material and he blindfolded them and tied their hands. They secured the keys to the automobile from the husband, and Mrs. Meeks heard the car start up and then stop in front of the house. The man with the gun ordered her to stand up, and walked her out of the house, and put her in the back seat of the car. The second man came out of the house and got in the back seat of the car with Mrs. Meeks, and the car started up and turned east on the highway. Mrs. Meeks testified that she was very familiar with the roads in that vicinity, and that she was positive that they drove through the town of Sheridan, as she could see the red light on the railroad track and knew that they were crossing these tracks. They then proceeded over a rough road, and after driving awhile the car stopped. They directed Mrs. Meeks to get out of the car, and she started to walk over the hill and through a wire fence. She stated that her blindfold was up, and that she could see the man who was with her, although his face was covered. This man, who had the gun, wore white shoes. The second man wore black shoes. After walking a distance they all sat down until daybreak. Only one of the men stayed with Mrs. Meeks at that time. One of the men smoked cigarettes. At daylight the men commanded Mrs. Meeks to stand up, and they all walked over the hills in the direction from which they had come. After walking for some time they came to a patch of poison oak shrub, which they entered, and where Mrs. Meeks stayed until Sunday morning. Her blindfold was up so she could see when she reached this hideout. She testified that the man who was with her during this time slept occasionally, and that she could see his face on several occasions. He threatened her with a gun if she made any noise. When he was asleep he had his mask off and she could see his face. She observed that he was wearing white shoes,—"a white leather shoe with raised seams from the toe to the instep or to the last". She noticed blond or reddish blond hair on his ankles over an inch long. About 4 o'clock Saturday morning the man who was with her handed her a small piece of cheese which was done up in an oiled paper wrapping. "He told me that the other man had brought the cheese to him; he stated that this other man had brought a newspaper which stated that my husband had put the matter in the hands of the law, and the 'boss' had sent word for him to blow my brains out and throw me in the river." She told him she would do everything in her power to keep the law away from him, and he finally said he was not going to shoot her. About 5 o'clock on Saturday afternoon the man with the white cap who had walked away, returned and told Mrs. Meeks to be quiet and not to move, and that he would come back and get her that evening and take her home. She said she had seen the man since that time, and he was in the courtroom; his name was Robert Grimes. Defendant Robert Grimes stood up, and Mrs. Meeks stated that he was one of the men who was with her upon the occasion mentioned. Both the men having left her alone, Mrs. Meeks finally left the place where she was concealed, and walked along the county road. A man driving along the road offered to take her home, and she thereupon was driven back to the ranch. Mrs. Meeks stated further that the second man resembled in appearance and build, defendant Ollen Grimes. The testimony of the husband, W. R. Meeks, is substantially the same as that of his wife concerning everything that took place at the ranch. He testified that after the two men had led his wife out to the car in front of the house, one of them returned and asked him if he could raise $25,000. He told them it could not be done. The man then said, "Do you realizing that kidnaping means the electric chair to me if I am caught, and I don't intend to be caught; you do as I say O.K. or you will never see your wife again." This man went out the front door and returned a second time and asked Mr. Meeks if he could raise $15,000. The husband replied that he did not know whether or not it could be done, but that he would try. The man replied, "If you don't, you will never see your wife alive again." This man then told Mr. Meeks to leave the money at the first bridge off the Bear river bridge south of Wheatland on 99. He did not see his wife again until Monday morning, September 4th.

Sheriff Ullrey testified that shortly after Mrs. Meeks had been taken from the home, he examined the ground across the road from the Meeks' home. He found two tracks leading into the orchard on the north side of the road, and followed them to a point where the dirt had been deposited during the excavation of an irrigation ditch. He found two places which indicated that two persons had sat on the bank of the ditch. He saw two different foot-prints. They were about the same as to size, and the toes were pointed. One had a diamond design on a rubber heel, and the other had a rubber heel with the trade-mark "Runner". Hugh Hensley testified that he visited the poison oak patch where Mrs. Meeks was concealed on September 4, 1938, and found cigarette stubs, matches, a piece of wrapper, like a cellophane wrapper, a piece of cheese, and a piece of tinfoil. C. Hites, an orchardist living about one mile from the Meeks' place, testified that the defendants worked for him in December, 1936. Daniel H. Carey testified that he owned a ranch adjoining Meeks' place, and that Robert Grimes worked for him during January, 1938. He testified that due to the fact that he had some eye trouble, the checks with which Robert Grimes was paid were drawn jointly by him and Mrs. Meeks, and that Mrs. Meeks' name appeared on all of these checks. Mrs. Ethel Taillifer testified that she operated a general store about seven miles south of Marysville, on the west side of highway 99-E. She stated that on the evening of September 2, 1938, she sold some "Wing" cigarettes, beer, cheese, bread, beans and corned beef to a man whom she identified in the courtroom as Ollen Grimes. The cheese was wrapped in cellophane. She stated that this defendant had no automobile. W. W. Irvine testified that he and his wife ran a soda-fountain and lunch place in Yuba City, and that around midnight of September 3d, or early in the morning of September 4, 1938, the two defendants came into his place of business and had four cups of black coffee. He testified that Robert Grimes was dressed in dark clothes, and that he looked as though he was very sleepy or sick. His face was flushed. Mrs. Lucy Irvine, wife of the last-named witness, testified that the two defendants entered their place of business in the same manner as indicated by her husband. She identified the two men positively as the defendants on trial. She stated that the younger man wore white shoes, and that by the word "younger" she meant Robert Grimes, whom she pointed out in the courtroom. She testified that his face was very flushed, and that he kept rubbing it intensely, and seemed ill; that both defendants drove up in an automobile, and she saw them get back into the car and drive off; that while they were in her store they appeared highly nervous.

Each of the defendants testified in his own behalf. Each denied any connection with the affair, and testified that on the evening of September 1st, and at the time the offense was committed, they were at another place; they stated that they were together at all times. Julius Offsky, a pawnbroker doing business in Sacramento, testified that he purchased a suit from defendant Ollen Grimes on the evening of September 1st. A record of the purchase was admitted. The time was indicated as 10:30 a. m. James Dickerson testified that he met the defendants walking across the American river bridge toward North Sacramento, and that one of them wore white shoes. He could not recall the exact date, placing the time as the latter part of August, 1938. He stated it might have been the 1st of September, but he was not positive. The defendants testified that they boarded a freight train out of Roseville on the evening of September 1st, and traveled by way of Stockton and Los Angeles until they reached Louisville, Ky., at 5:30 p. m. on September 12, 1938.

With respect to defendant Robert Grimes, it is at once apparent from the foregoing record that the case is not one involving a conviction based upon circumstantial evidence. On the contrary, there is a positive identification of this defendant by Mrs. Meeks. There are also other facts and circumstances proven against both defendants, and which will be referred to in connection with the appeal of defendant Ollen Grimes.

[3] Taking up the appeal of the last-named defendant, it is earnestly contended that he was never identified by Mrs. Meeks or her husband as one of the two persons who kidnaped them, and that he was convicted chiefly upon the fact that he was a brother of Robert Grimes. It is argued that this defendant was convicted upon suspicion and conjecture, and that there is a total failure of proof of guilt. Our opinion is that there is sufficient evidence in the record to justify a finding by the jury that both defendants were guilty of the offenses charged. As we have stated, defendant Robert Grimes was positively identified by Mrs. Meeks as one of her abductors. She and Mr. Meeks also testified that the general build of one of the men who committed the offense was similar to that of defendant Ollen Grimes. She saw Ollen Grimes at her home before being blindfolded, and talked with him several times, and although he wore a mask at the time, she had ample opportunity to familiarize herself with his general physical characteristics, excepting the appearance of the lower part of his face, which was hidden by the mask. There is testimony that the defendant Ollen Grimes purchased cheese on the same day when it was delivered to Mrs. Meeks in the poison oak patch. There is the testimony of Mr. and Mrs. Irvine to the effect that both defendants entered her place of business near Marysville about midnight on September 3, 1938. There is further testimony by the defendants themselves that at no time during the time covered by this episode were they separated; they stated that they were constantly together.

[4, 5] As to the defense of an alibi, except for the testimony of the defendants themselves, there is no evidence produced in their behalf which would positively prove that they were in Roseville or Sacramento, or any other place than the scene of the crime at the exact time of the commission of the offense. The testimony of the pawnbroker placed them in Sacramento at 10 o'clock in the morning of the day the crime was committed. As the scene of the crime is distant some fifty miles from Sacramento, and as the crime was committed between 11 and 12 o'clock p. m. of that day, we are unable to agree with counsel for appellants that there is anything conclusive in connection with the testimony of the pawnbroker. The testimony of Mr. Dickerson is equally as inconclusive, as he was not positive as to the day he saw defendants between Sacramento and North Sacramento. He stated it might have been September 1st, but he was not sure of it. It is true that the jury might have inferred from testimony of this character that the defendants were not at the scene of the crime when it was committed. This, however, is a question of fact which the jury resolved against the defendants, and we cannot say that their conclusion lacked evidentiary support. An appellate court has no power to set aside a verdict unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support it. People v. Kneiling, 127 Cal.App. 151, 15 P. 2d 561. "The [reviewing] court must assume in favor of the verdict or decision the existence of every fact which the jury or judge could have reasonably deduced from the evidence and then determine whether or not the guilt of the defendant is deducible therefrom." People v. Rose, 26 Cal. App.2d 513, 79 P.2d 737, 739.

Defendants, in connection with the evidence purporting to establish an alibi in their behalf, rely upon the case of People v. Singh, decided by this court and reported in 11 Cal.App.2d 244, 53 P.2d 403, 406. In that case a judgment of conviction was reversed, as it was held a conclusive alibi was established on behalf of the defendant, who was a member of the Hindu race. The only evidence connecting the defendant with the commission of the crime of assault with a deadly weapon with intent to commit murder, was the testimony of the prosecuting witness (another Hindu). Eight disinterested white witnesses testified in behalf of the defendant, and stated that at the exact time the offense was committed, the latter was on the streets of Marysville, and their testimony was held by the court to have established conclusively that the defendant was not present at the scene of the crime at the time of its commission. It appears from the opinion, however, that these facts alone did not impel the conclusion reached by the court. The other factor which was persuasive in arriving at a reversal of the case appears in the following language taken from that opinion: "The evident disregard of the conclusive effect of the proof of a complete alibi in the present case in behalf of Sansar indicates that the verdict against him was the result of race prejudice, particularly in view of the prejudicial statements of counsel in that regard, which were approved by the court." Thus, the case can be readily distinguished from the instant case, first: on the ground that the evidence of the alibi, from disinterested witnesses, if believed by the jury, made it *impossible* for the defendant to have been at the scene of the crime when it was committed; and second: it appears in the record that the jury must have been influenced by the prejudicial statements of counsel in appealing to race prejudice. Our conclusion is that there was sufficient evidence in the record to support the verdict against each of the defendants.

[6] It is contended in respect to both of the defendants that the trial court committed prejudicial error in the matter of admitting evidence of a former offense. When the defendant Ollen Grimes was on the witness-stand, the district attorney asked him the following question: "Now, Mr. Grimes, did you not, on or about the 22nd day of April, 1938, plead guilty to a crime of felony, to-wit: violation of Section 538 of the Penal Code, in the Superior Court of the State of California, in the County of Placer?" To this question the defendant answered: "I did." The section referred to provides in effect that every person who, after mortgaging his property, causes the same to be sold, is guilty of larceny. It is the contention of appellant that there is no evidence showing that the crime to which this defendant plead guilty, was a felony. Upon further examination by his own counsel this defendant testified that the mortgaged property consisted of a number of turkeys. He testified that he had the turkeys mortgaged, and sold them and kept the money; he stated that the number of turkeys sold was three hundred and fifty. It further appears from the evidence that the amount of the mortgage was $750. Under the provisions of section 487 of the Penal Code, subdivision 1, when the personal property taken consists of domestic fowls, and the value thereof exceeds $50, the crime shall constitute grand theft. Larceny is now denominated in the Penal Code as theft, and grand theft is made a felony under the provisions of section 489 of the Penal Code. It appears from the record that the former crime was committed jointly by both of these defendants, and the evidence of the former offense with respect to each is substantially the same. The facts that turkeys were mortgaged for $750, and that they numbered three hundred fifty, were sufficient to justify a finding by the jury that the value of the turkeys sold exceeded the sum of $50. We believe that under the circumstances a prior conviction of a felony was shown with respect to each of the defendants.

[7] Lastly, it is urged with respect to each of the defendants that there is a fatal variance between the allegations of the indictment and proof. In the second count it is urged that the defendants "did kidnap and carry away one Norma Meeks, with intent to restrain said Norma Meeks, and thereby commit extortion, and extract from the *relatives* and *friends* of said Norma Meeks, money and other valuables". It is argued by appellants that the only demand made upon anyone was made upon the husband of the victim, and that a husband is neither a *relative* nor a *friend* of his wife. In support of this contention it is pointed out that under the laws of succession and inheritance, a husband is not a "relative". We are of the opinion that the word "relative", as used in section 209 of the Penal

Code, which defines crime charged in the second count, is not used in a technical sense, but was intended by the legislature to be employed according to the language found in the Estate of Sowash, 62 Cal.App. 512, at page 516, 217 P. 123, at page 125, which is as follows: "The word is a very general and comprehensive term, and may include in its generic sense every relation that arises in social life. Esty v. Clark, 101 Mass. 36, 3 Am.Rep. 320. Lexicographers have defined it as signifying a relation in general so as to include relationship by blood or affinity. In its widest sense, therefore, the word no doubt has this meaning."

[8] Neither would it do violence to the English language to hold that under ordinary circumstances the husband is a "friend" of his wife. The point is without merit.

Our conclusion is that each of the defendants was fairly and impartially tried and convicted, and that the appeal is without merit.

The judgment and order denying the motion for new trial, in respect to each defendant, are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

35 Cal.App.2d 304

METTER v. LOS ANGELES EXAMINER et al.

Civ. 11864.

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1939.

Hearing Denied Dec. 28, 1939.

1. Trespass 🔑44
Trover and conversion 🔑35

In action against newspaper for publishing picture of plaintiff's wife in connection with story of wife committing suicide, it could not be inferred that, because picture of wife similar to one taken from plaintiff's home appeared in newspaper, defendant newspaper had possession of photograph which was taken from plaintiff's home, so as to entitle plaintiff to recover on his allegations of trespass and conversion. Code Civ. Proc. § 1963, subd. 1.

2. Evidence 🔑54

An inference must be founded upon a fact legally proved and upon deductions to be drawn from such proven fact.

3. Torts 🔑8

The "right of privacy" is the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity.

[Ed. Note.—For other definitions of "Right of Privacy," see Words & Phrases.]

4. Torts 🔑8

Where one, whether willingly or not, becomes an actor in an occurrence of public or general interest, he emerges from his seclusion, and it is not an invasion of his "right of privacy" to publish his photograph with an account of such occurrence.

5. Abatement and revival 🔑54

An action for violation of right of privacy is a purely personal action, and does not survive, but dies with the person.

6. Torts 🔑8

An action for violation of right of privacy does not exist in dissemination of news and news events, nor in discussion of events of the life of a person in whom the public has a rightful interest.

7. Torts 🔑8

A violation of the "right of privacy" consists in the interference with another's seclusion by subjecting him to unwarranted and undesired publicity, and such constitutes a "tort" for which injured person is entitled to recover damages.

[Ed. Note.—For other definitions of "Tort," see Words & Phrases.]

8. Torts 🔑20

A right of action for violation of right of privacy is purely a personal one, and plaintiff must prove an invasion of his own right of privacy before he can recover.

9. Torts 🔑8

Use of photograph of woman who committed suicide by newspaper in connection with its account of such occurrence, notwithstanding husband's request not to publish picture, was not actionable as violating husband's "right of privacy."

10. Torts 🔑8

The "right of privacy" does not prohibit any publication of matter which is of "public or general concern," and, while general object in view is to protect the privacy of private life, nevertheless, to whatever degree and in whatever connection a person's life has ceased to be private, before publication under consideration has been made, to that extent the protection is to be withdrawn.

> News regarding matters of "public or general concern" is news that is said to have that indefinable quality of interest which attracts public attention; it is a report of recent occurrences.
>
> [Ed. Note.—For other definitions of "Public Concern," see Words & Phrases.]

11. Literary property 🔑9

The ownership of a common-law copyright in a photograph, the publication of which is sought to be enjoined or damages sought for the publication of copies thereof, is a matter of proof, and burden rests upon plaintiff to show that he was owner of the copyright.

12. Literary property 🔑3

The ownership of a common-law copyright in a photograph may be in the photographer who took the picture, in the one whose picture was taken, or a third party who procured photographed person to pose for picture and who paid therefor.

13. Literary property 🔑6

A common-law copyright in a photograph may be assigned by the possessor thereof, and, therefore, possession of a print made from the negative raises no presumption that possessor is owner of common-law copyright.

14. Literary property 🔑3

In action against newspaper for publishing picture of plaintiff's wife in connection with story of wife committing suicide, evidence which showed only that husband had a print of photograph made from negative, and which failed to show that he possessed exclusive right to regulate reproduction of prints made from original negative, was insufficient to entitle husband to damages for violation of common-law copyright in picture.

15. Appeal and error 🔑1056(1)

In action against newspaper for publishing picture of plaintiff's wife in connection with story of wife committing suicide, excluding evidence of telephone conversation between plaintiff and night city editor of defendant newspaper offered by plaintiff to show that he advised newspaper that wife's photograph had been stolen from his home and that he claimed it was in possession of newspaper was not prejudicial to plaintiff, in view of other evidence.

16. Appeal and error 🔑1058(2)

In action against newspaper for publishing picture of plaintiff's wife in connection with story of wife committing suicide, excluding questions asked plaintiff whether reproduced and published picture of wife was fair and accurate reproduction of photograph which was taken from his apartment was not prejudicial error, in view of plaintiff's testimony to same effect.

17. Appeal and error 🔑1058(3)

In action against newspaper for publishing picture of plaintiff's wife in connection with story of wife committing suicide, refusal to permit managing editor to testify as to right of editors of defendant newspaper to alter articles prepared for publication was not prejudicial to plaintiff, where plaintiff had benefit of testimony of night city editor.

18. Appeal and error 🔑105

No appeal lies from an order directing a verdict.

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Jack Metter against the Los Angeles Examiner and others for trespass, conversion, and for violation of his right of privacy. From a judgment for defendants based on a directed verdict, the plaintiff appeals.

Affirmed.

G. A. Bisbee, Harold R. Spence, and Max Tendler, all of Los Angeles, for appellant.

Lawler, Felix & Hall, John M. Hall, and A. Laurence Mitchell, all of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff filed a complaint in the court below seeking damages against the defendants for trespass, conversion, and for the violation of his right of privacy. With the issues framed by appropriate pleadings, the cause proceeded to trial before a jury. At the conclusion of plaintiff's case the defendants, without offering any testimony, also rested their case, and thereupon moved the court for a directed verdict in favor of each of such defendants. Following the granting of such motion and the entry of judgment thereon, plaintiff prosecutes this appeal from such judgment.

Epitomizing the facts alleged in the amended complaint and proven at the trial, the record discloses that on February 1, 1935, Mrs. Metter, the wife of plaintiff, committed suicide by plunging from the twelfth floor fire-escape of an office building in downtown Los Angeles. Learning of the tragic death of his wife upon his return home from work, plaintiff went to the coroner's office, where he encountered some newspaper reporters while viewing the body of his wife. Following a conversation with one of the reporters, plaintiff went to his home, and upon entering the house discovered that the screen to the kitchen window had been forced open and that a photograph of his wife which had been on the living room table when he departed for work in the morning was missing. Following a telephone conversation with some one in the editorial rooms of the defendant Los Angeles Examiner, plaintiff went personally to the Examiner building, arriving there about eight p. m., when he had a conversation with defendant Harry H. Morgan, night city editor of the paper, wherein plaintiff advised Mr. Morgan of his identify, that he was the party who had theretofore telephoned regarding the disappearance of his wife's picture; that he did not want anything printed in the paper about the death of his wife; that her picture had been stolen from his home and that he did not want the picture printed or reproduced in the newspaper; and that he knew "they" had the "picture". Defendant Morgan then advised plaintiff that he had nothing to do with the matter; that the day city editor was in charge at the time of Mrs. Metter's death; but that if plaintiff would return in a short time, he, Morgan, would contact the day city editor concerning the matter. When plaintiff returned to meet defendant Morgan the latter told plaintiff that the day city editor knew nothing of the picture; that the paper had a story of Mrs. Metter's death, and that the paper had a copy of a photograph of Mrs. Metter, but that the photograph itself was in the possession of the homicide squad of the police department. After again admonishing defendant Morgan as night city editor that he did not want the stolen photograph reproduced in the newspaper, plaintiff departed. It was conceded at the trial that there were five major editions of the Los Angeles Examiner during the late afternoon and evening of February 1, 1935, and the early morning of February 2, all of which bore the last-named date. It was agreed that in one of the editions of the paper which went to press several hours after the plaintiff talked with defendant night city editor, there appeared an account of the suicide of plaintiff's wife with a picture of her, together with a picture of a building court into which had been drawn the figure of a body falling headlong to the ground. The picture of plaintiff's wife appearing in the newspaper was identified by plaintiff as being a likeness of his wife, having the same characteristics and being similar in appearance to the picture allegedly stolen from plaintiff's home. The evidence indicates that the picture of plaintiff's wife did not appear in two earlier editions of the newspaper known as the five and seven-thirty o'clock editions. Mention of this fact is made for the reason that appellant contends therefrom that when he talked with defendant night city editor Morgan at about eight p. m. the latter still had it within his power to prevent publication of the picture in accordance with plaintiff's demand.

[1, 2] With reference to the allegations of trespass and conversion, it is at once apparent from the foregoing narrative of the testimony that there was before the court no direct evidence that the Los Angeles Examiner or its representatives or agents either entered the premises of plaintiff or took therefrom the photograph of his wife. Nor is there any substantial evidence that the purloined photograph was ever in the possession of defendant newspaper or its agents. However, we are asked by appellant, as was the trial court, to infer that because a picture of his wife appeared in the Los Angeles Examiner defendants had possession of the missing photograph. This is urged upon the reasoning contained in cited cases (People v. Taylor, 4 Cal.App.2d 214, 217, 40 P.2d 870; People v. Savage, 14 Cal.App.2d 142, 57 P.2d 973; People v. Frahm, 107 Cal. App. 253, 265, 290 P. 678) to the effect that possession of stolen property, while not sufficient to connect a defendant with

the perpetration of the theft, is nevertheless a circumstance which may be considered by the jury in connection with other evidence, and that unless such possession is satisfactorily explained it warrants an inference upon which guilt may be predicated. But the fallacy of such an argument in the case at bar is immediately apparent when we realize that it is based upon the assumption that the photograph which had been removed from appellant's home was in the custody or possession of the Examiner, when the record is barren of any evidence to prove either that the Examiner or its agents entered appellant's home or even had possession of the missing photograph. Appellant is in error when he says that the Examiner, through its agent and codefendant, night city editor Morgan, admitted possession of the missing photograph. What defendant Morgan testified to was that the newspaper had a copy of a photograph of Mrs. Metter and that the photograph for which appellant was searching was with the homicide squad at the police station. In the case before us there is no evidence to refute the inference that the Examiner obtained its "copy" of the likeness of plaintiff's wife by preparing its own picture of such likeness from the photograph while the latter was in the custody of the Los Angeles police. At the trial plaintiff did not choose to place upon the witness stand any witness from the police department as to whether the photograph was taken by the police or was in their possession as contended by defendant night city editor. An inference must be founded upon a fact legally proved and upon deductions to be drawn from such proven fact. Here the fact of possession of the missing photograph remained unproved, and consequently no inference of wrongdoing may be indulged in. There is a presumption that a person is innocent of crime or wrong (Subd. 1, sec. 1963, Code Civ.Proc.), the benefit of which can only be destroyed by evidence. Upon the issues of trespass and conversion the defendants were entitled to a directed verdict.

Appellant next contends that conceding he could not recover against defendants on the trespass and conversion counts of his complaint, he is nevertheless entitled to recover for the violation by defendants of what has become known as "the right of privacy". This right appears to have been first discussed in a law journal essay in 1860. It did not, however, attract any considerable attention from the bench and bar until the year 1890, when an article was published in 4 Harvard Law Review, page 193, authored by Justice Brandeis and Samuel B. Warren. Following the advent of this essay a number of cases in which the so-called doctrine of the right of privacy was involved came before the courts of the various states. While the doctrine was accorded recognition in some jurisdictions, including California (Melvin v. Reid, 112 Cal.App. 285, 297 P. 91), others have refrained from giving it effect. It is not necessary to present in detail a review of the decisions from other states in which the right was given consideration, because in Melvin v. Reid, supra, the court cites many cases from jurisdictions which have both approved and refused to accept the doctrine of the right of privacy.

[3, 4] In a number of states extending recognition to the doctrine of the right of privacy it has been defined as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be let alone. 21 R.C.L. 1197, 1198. There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence." Jones v. Herald-Post Co., 230 Ky. 227, 18 S.W.2d 972, 973. It might appropriately be observed that "public or general interest" as used in the foregoing opinion is not to be confused with mere curiosity.

[5, 6] With reference to the fundamentals upon which the right of privacy exists, it is said in Melvin v. Reid, supra [112 Cal. App. 285, 297 P. 92]:

"A few general principles, founded on authority or reason, seem to run through most of the better considered decisions from the jurisdictions which recognize the doctrine as well as those which do not. We may summarize them as follows:

"(1) The right of privacy was unknown to the ancient common law.

"(2) It is an incident of the person and not of property—a tort for which a right of recovery is given in some jurisdictions.

"(3) *It is a purely personal action, and does not survive, but dies with the person.*

"(4) It does not exist where the person has published the matter complained of, or consented thereto.

"(5) It does not exist where a person has become so prominent that by his very prominence he has dedicated his life to the public, and thereby waived his right to privacy. There can be no privacy in that which is already public.

"(6) *It does not exist in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest,* nor where the information would be of public benefit, as in the case of a candidate for public office.

"(7) The right of privacy can only be violated by printings, writings, pictures, or other permanent publications or reproductions, and not by word of mouth.

"(8) The right of action accrues when the publication is made for gain or profit. (This, however, is questioned in some cases.)" (Italics added.)

[7] The following definition of the right in question is found in 21 Ruling Case Law, pages 1198 to 1200: "Violation of the right of privacy consists in the interference with another's seclusion by subjecting him to unwarranted and undesired publicity. * * * The violation of the right of privacy is a tort and the injured person is entitled to recover damages."

[8] A right of action for violation of one's right of privacy being purely a personal one, appellant must allege and prove an invasion of his own right of privacy before he can recover. In this connection it becomes unnecessary to discuss the cases cited by appellant wherein the courts have allowed recovery for the publication of a photograph where such publication was a breach of contract, or violation of a confidential relation (Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194; Douglas v. Stokes et ux., 149 Ky. 506, 149 S.W. 849, 42 L.R.A.,N.S., 386, Ann.Cas.1914B, 374), because there was no contract, express or implied, or any relation of trust or confidence between either plaintiff, Mr. Metter, or Mrs. Metter, on the one hand, and the Los Angeles Examiner or any other defendant on the other hand. Notwithstanding the fact that the picture reproduced was that of appellant's deceased wife and that no reference was made to him in the printed newspaper article except that he was Mrs. Metter's husband and that he was quoted with reference to the causes to which he ascribed his wife's suicide, appellant argues that his right to privacy was outraged by publication of the circumstances surrounding his wife's death. This claim he apparently bases upon the principle enunciated in Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P.2d 535, 536, where the court said: "The exhibition of callousness or indifference, the offer of insult and indignity, can, of course, involve no injury on the dead, but they can visit agony akin to torture on the living."

[9] Whatever right of privacy Mrs. Metter had having died with her, we are nevertheless asked to recognize an asserted right by appellant to enforce a right of privacy which he himself possessed, based, as he says, upon what is denominated as a "relational right" of privacy, or in other words, a right to be spared unhappiness through publicity concerning another person because of one's relationship to such person. Neither by the pleadings, at the trial, nor on this appeal is there any complaint made of anything published which directly related to appellant; but nevertheless he claims a right to recover by reason of publicity relating solely to one who was related to him as his wife. In connection with appellant's claim in this regard, the holding by the District Court of Appeal in the California case of Melvin v. Reid, supra, to the effect that when the incidents of a life are so public as to be *spread upon a public record,* they come into the knowledge and into the possession of the public and cease to be private, has a direct application to the facts presented in the case before us. Mrs. Metter's death, to which publicity was given, and in connection with which her picture was published, immediately set in motion, pursuant to the provisions of section 1510 of the Penal Code, an investigation by the coroner. Manifestly an individual cannot claim a right to privacy with regard to that which cannot, from the very nature of things and by operation of law, remain private. When, therefore, the circumstances surrounding the demise of Mrs. Metter became by operation of law the object of an investigation by a public officer and also became the subject-matter of a public record, the publication of the facts in connection therewith violated no one's right to privacy. The manner of Mrs. Metter's death imposed upon the coroner the duty of making an official investigation as to the cause of death, with regard to which all relevant circum-

stances became the proper subject of official inquiry. The incident described by respondent newspaper had to do with these circumstances, and therefore the publication thereof cannot be held to violate a right of privacy.

[10] It is also recognized that the right of privacy does not prohibit any publication of matter which is of public or general concern; and while the general object in view is to protect the privacy of private life, nevertheless, "to whatever degree and in whatever connection a person's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn". Brandeis-Warren Essay, 4 Harvard L.Rev. 193, p. 214; Brents v. Morgan, 221 Ky. 765, 299 S.W. 967, 55 A.L.R. 964. In connection with what constitutes news regarding matters of public or general concern, it is said in Associated Press v. International News Service, 2 Cir., 245 F. 244, 248, 2 A.L.R. 317, affirmed 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293, that news is said to have "that indefinable quality of interest, which attracts public attention"; while the court in Jenkins v. News Syndicate Co., 128 Misc. 284, 285, 219 N.Y.S. 196, 198, defines news as a "report of recent occurrences".

It seems to us that by her own conduct Mrs. Metter waived any existing right of privacy, "relational" or otherwise, that would prevent the publication of her picture in connection with the newspaper story. She went to a public edifice in the heart of a large city and there ended her life by plunging from such high building. It would be difficult to imagine a more public method of self-destruction. For a brief period and in the pitiful and tragic circumstances attending her demise she became an object of public interest. Her own act brought this about. It was her own act which waived any right to keep her picture from public observation in connection with the news account of her suicide.

[11-14] Referring again to the publication of the photograph of Mrs. Metter, it is urged by appellant that he possessed a property right enabling him to control the copying by defendants of the photograph of his deceased wife. Appellant's contention in this regard is thus stated by him in his brief: "Certainly if I give a photograph to a friend, I do not thereby give such friend a right to deliver that photograph to a paper to be published, since, like a letter, the general property rights still remain in me, while the friend has only the special property right of using it in the ordinary manner that photographs are used. In other words, the analogy is complete between the photograph and the written letter."

Thus appellant seeks to apply to the case at bar the law relating to the use of private letters, contending that he has the same *property right* to control copying and publication of his wife's picture as the author of a private letter has to control the copying and publication of such letter. This contention involves the application of common-law rules with respect to literary property, sometimes referred to as the law of common-law copyright. The ownership of a common-law copyright in a photograph, the publication of which is sought to be enjoined or damages sought for the publication of copies thereof, is a matter of proof, and the burden rests upon the plaintiff to show that he was the owner of the copyright. Such right may be in the photographer who took the picture, in the one whose picture was taken, or even a third party who procured the photographed person to pose for the picture and who paid for the same. Press Pub. Co. v. Falk, C.C., 59 F. 324; Lumiere v. Robertson-Cole Distributing Corp., 2 Cir., 280 F. 550, 24 A.L.R. 1317; Altman v. New Haven Union Co., D.C., 254 F. 113; Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849, 42 L.R.A.,N.S., 386, Ann.Cas.1914B, 374. This property right may also be assigned by the possessor thereof. Therefore, possession of a print made from the negative raises no presumption that the possessor is the owner of the common-law copyright in and to the picture. All that the record before us shows is that the appellant had in his possession a photograph of his wife, i. e., one of a number of prints which had been made from a negative prepared by a photographer who originally posed Mrs. Metter. Nothing is shown with reference to the circumstances surrounding the taking of the photograph to indicate who possessed the common-law copyright therein. Nor is there any evidence to show that such property right was vested in appellant. True, he had a print made from the negative, but there is no evidence that he possessed the exclusive right to regulate reproduction of prints made from the original negative.

[15] During the trial the court by its ruling excluded evidence of a telephone conversation between plaintiff and defendant night city editor Morgan, on the ground

that sufficient foundation was not laid to establish the identity of Morgan as one of the participants in the conversation. No prejudicial error can be predicated upon this ruling, for the reason that what plaintiff sought to establish by the proffered testimony was that in the conversation he advised defendants that the photograph of his wife had been stolen from his home and that he claimed the same was in possession of defendant Examiner; and there is in the record evidence that plaintiff made these identical claims to defendant Morgan in a subsequent conversation a few hours after the telephone conversation, which later conversation took place several hours prior to the time the edition of the newspaper containing the picture of plaintiff's wife went to press.

[16] We perceive no prejudicial error in the trial court's ruling sustaining an objection interposed by defendants to questions asked of plaintiff as to whether the reproduced and published picture of his wife was a fair and accurate reproduction of the photograph of his wife which was taken from his apartment. Plaintiff was permitted to testify that the picture in the newspaper appeared and looked similar to the photograph which was in plaintiff's apartment and that the two pictures, the photograph which had been removed from his home and the picture which was printed in the newspaper, had the same characteristics. Furthermore, we fail to see how the testimony in the form it was sought to be elicited by plaintiff, would be material to the issues raised by the pleadings or framed by the evidence.

[17] Nor was there prejudicial error in the ruling of the trial court by which the witness Van Ettisch, managing editor of defendant newspaper, was not permitted to testify in relation to the routine, right and practice of the editors of defendant newspaper to delete, alter or modify articles prepared for publication, because plaintiff had the benefit of defendant Morgan's testimony that in his capacity as night city editor Morgan had in the past modified and changed articles which had been prepared for publication and that there were cases when changes had been made in stories after the "lay-out" for a particular edition had been drafted thereby establishing the fact that it was within the power of those in charge of the editorial department of the newspaper as defendant Morgan was to make such alterations. Moreover, the evidence clearly indicates that the first edition in which the photograph of appellant's wife appeared did not go to press until several hours after he had a conversation with night city editor Morgan in which appellant forbade publication of his wife's picture. Further, the determination of the issues in this case is not affected by the existence or absence of such authority in the newspaper editors.

By reason of the foregoing, we find it unnecessary to determine the correctness of the court's ruling sustaining a demurrer without leave to amend to plaintiff's fourth cause of action, having to do with the right of privacy. A claim under such right was presented in the first cause of action of his amended complaint.

[18] The attempted appeal from the order granting the motion for a directed verdict is dismissed, for the reason that no appeal lies from such order.

From what we have herein said it follows that the trial court was correct in directing the jury to return a verdict in favor of defendants, and the judgment entered upon such verdict must be and it is therefore affirmed.

I concur: YORK, P. J.

DORAN, Justice (dissenting).

I dissent, although I am in entire accord with much of that which is enunciated in the prevailing opinion. That "there is a presumption that a person is innocent of crime or wrong * * * the benefit of which can only be destroyed by evidence", as declared in the prevailing opinion, there can be no question. It must be emphasized, however, that this presumption is merely a disputable presumption. In my judgment, the evidence adduced by the plaintiff with regard to the loss by him of the photograph and the possession of a copy of such photograph by the defendant newspaper, was sufficient to overcome the presumption and shift the burden of proof to the defendant. In that connection, the obvious interest of the defendant newspaper in obtaining a photograph was a circumstance of no little consequence.

In the light of the record, and the burden of proof having shifted, the defendant was bound to explain the lawful possession of the photograph as well as the justification for its publication. Such questions of fact were properly for the jury's determination. Upon this premise, in my opinion, the order granting the motion for an instructed verdict was error.

JACKSON v. MASTER HOLDING CORPORATION et al.*

Civ. 12277.

District Court of Appeal, Second District, Division 2, California.

Nov. 2, 1939.

Rehearing Denied Nov. 21, 1939.

Hearing Granted Dec. 28, 1939.

1. Limitation of actions ⚿179(2)

Where an action for fraud is not commenced within three years from date of alleged fraud, plaintiff, in order to prevent action from being barred by statute of limitations, must allege when fraud was discovered, setting forth sufficient facts to show justification for not having sooner discovered the fraud and the circumstances under which it was discovered. Code Civ.Proc. § 338, subd. 4.

2. Limitation of actions ⚿179(2)

In action to recover damages for alleged fraudulent sale of stock, commenced more than three years after alleged fraud, complaint, in absence of allegations justifying plaintiff's failure to discover fraud within three year period, was demurrable on ground that action was barred by statute of limitations. Code Civ.Proc. § 338, subd. 4.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action to recover damages allegedly resulting from fraud in sale of stock by Emma Jackson against Master Holding Corporation, a corporation, and others. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

F. W. Sawyer, of Los Angeles, for appellant.

Wm. N. Graybiel, of Turlock, for respondent Turlock Guarantee Building Loan Ass'n.

T. B. Scott and E. H. Zion, both of Modesto, for respondent El Portal Building Loan Ass'n.

McCOMB, Justice.

From judgments in favor of defendants predicated upon the trial court's sustaining demurrers to plaintiff's second amended complaint without leave to amend in an action to recover damages alleged to have resulted from the fraud of defendants in selling plaintiff stock, plaintiff appeals.

The essential facts are:

In plaintiff's amended complaint it is alleged in substance: (1) On or about July 30, 1930, due to fraudulent representations of defendant plaintiff purchased 100 shares of class A and 100 shares of class B common capital stock of defendant Master Holding Corporation for the sum of $5,000, and (2) that she did not discover the fraud until on or about May 9, 1935.

Defendants demurred to the complaint on the ground, among others, that the cause of action was barred by subsection 4, section 338 of the Code of Civil Procedure in that more than three years had elapsed from the date of the alleged fraud, July 30, 1930, to the date of the filing of the complaint, January 16, 1939.

This is the sole question presented for determination:

Was plaintiff's alleged cause of action barred by the statute of limitations (sec. 338, subsec. 4, Code Civ.Proc.)?

[1] This question must be answered in the affirmative. The law is established in California that, if an action for fraud be not commenced within three years from the date of the alleged fraud, plaintiff is required in order to bring himself within the exception provided for in subsection 4, section 338 of the Code of Civil Procedure to allege when the fraud was discovered setting forth sufficient facts to show justification for not having sooner discovered the fraud and the circumstances under which it was discovered. Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 486, 45 P. 809; Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 701, 16 P.2d 268.

[2] In the instant case an examination of the complaint fails to disclose the allegation of any facts justifying plaintiff in not sooner having discovered the fraud. Therefore, her cause of action, if any, is barred by the statute of limitations.

The judgments are affirmed.

I concur: WOOD, Acting P. J.

---

* Subsequent opinion 108 P.2d 673.

35 Cal.App.2d 358

Ex parte BURNETTE.

Cr. 2101.

District Court of Appeal, First District,
Division 1, California.

Nov. 3, 1939.

1. Bail 🔑52

Fixing bail at $100,000 bond or $50,000 cash pending appeal from conviction for rape was not an abuse of discretion, in absence of intervening circumstances. Pen. Code, § 1272; Const. art. 1, § 6.

2. Bail 🔑52

Presumptively, pending determination of appeal, accused had been properly convicted, as respects reasonableness of amount of bail fixed by the court. Pen.Code, § 1272; Const. art. 1, § 6.

3. Bail 🔑52

Bail is not to be deemed excessive merely because accused cannot give the bail required. Pen.Code, § 1272; Const. art. 1, § 6.

Petition by Huston Burnette for a writ of habeas corpus to secure reduction in amount of bail pending an appeal.

Petition for reduction of bail denied and writ theretofore issued discharged.

William F. Herron, of San Francisco, for petitioner.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Burnette petitions this court for a writ of habeas corpus for the purpose of having his bail reduced pending appeal from his conviction of the crime of rape. The petition and return, together with certain supporting affidavits, and the records of this court, disclose that, after the conviction, the trial court refused appellant a certificate of probable cause. Thereafter, upon the petition of Burnette, this court granted a writ of supersedeas to stay execution pending the appeal. People v. Burnette, Cal. App., 94 P.2d 399. The present petition alleges that thereafter the trial judge made an order admitting petitioner to bail pending the appeal, and fixed the amount of bail at $100,000 bond or $50,000 cash. The petition alleges that the bail so fixed is grossly excessive; is in violation of article 1, section 6 of the state Constitution providing that "Excessive bail shall not be required"; that prior to his conviction Burnette was at large on bail on the rape charge in the sum of $5,000 bond or $2,500 cash; that petitioner can give bail in the sum of $15,000 bond; that said sum is reasonable and ample to secure the appearance of petitioner.

It is to be noted that we are here dealing with an application for reduction in bail after conviction. Section 1272 of the Penal Code provides that after conviction bail in noncapital felony cases shall rest in the discretion of the trial court. There are many cases holding that the appellate courts will not disturb the trial court's discretion in such cases, unless some extraordinary circumstance has occurred since the trial, such as the illness of the defendant or after discovered evidence which tends to show his innocence. See 3 Cal.Jur., p. 1034, §§ 9 and 10; 13 Cal.Jur., p. 247, § 26; In re Wilkins, 66 Cal.App. 754, 226 P. 964; Ex parte Turner, 112 Cal. 627, 45 P. 571; Ex parte Voll, 41 Cal. 29; Ex parte Smallman, 54 Cal. 35. In Ex parte Smith, 89 Cal. 79, 26 P. 638, it was held that even where the trial court had adopted an inflexible rule that it would never admit to bail in felony cases pending appeal, the appellate court would not interfere with the trial court's determination except where intervening circumstances had occurred.

[1, 2] There is no contention here made that any intervening circumstance has occurred warranting this court in reducing the bail. Under such circumstances, if the trial court had denied bail the authorities above quoted establish that its discretion would not be interfered with by this court. Petitioner contends, however, that, inasmuch as the trial court has seen fit to fix bail, it has determined that the offense is bailable, and that having so determined, the bail must be reasonable under the constitutional provision above referred to. Even if we assume that the constitutional provision is applicable to the fixing of bail after conviction, an assumption that is probably not in accordance with the fact (Ex parte Voll, 41 Cal. 29), we cannot say as a matter of law that the trial court has abused its discretion in fixing the bail at $100,000 bond or $50,000 cash. This petitioner has been found guilty of rape. The trial judge, at the time he fixed the bail, was familiar with the evidence. He had observed the defendant; he knew the defendant was a recidivist; that he had been sentenced to Folsom; that he faced a

possibility of a fifty-year term. He also knew that pending trial the defendant had been released on bail furnished by relatives. Knowing all these facts, and knowing all the circumstances surrounding the charge of which defendant stands convicted, the trial judge determined, in the exercise of his discretion, that a $100,000 bond or $50,000 cash was reasonably necessary to assure the defendant's continued presence in the state. No abuse of such discretion appears. It must be remembered that the petitioner appears before this court as a convicted felon. Until his appeal is determined the presumption is that he was properly convicted.

[3] That the amount of the bail is not excessive as a matter of law is conclusively determined by the case of In re Pantages, 209 Cal. 535, 291 P. 831. In that case Pantages, after his conviction of the crime of rape, and after the trial court had denied bail pending appeal, applied to the Supreme Court for admission to bail pending the appeal, on the ground, among others, that further incarceration would likely result in his death. This was held to be a circumstance of such extraordinary character as warranted the Supreme Court in admitting the petitioner to bail pending appeal. The Supreme Court fixed such bail at $100,000—the same amount as fixed by the trial court in the present case. Certainly, if the Supreme Court thought in the Pantages case, in the exercise of its original jurisdiction, that $100,000 was a reasonable bail, we cannot say in this case that the trial court abused its discretion in fixing bail in exactly the same amount when this case involves exactly the same charge involved in the Pantages case. The mere fact that Pantages was financially able to raise such a bail, while petitioner may not be able to do so, does not determine that the trial court abused its discretion. It is well settled, even in cases involving bail after indictment and before conviction, that bail is not to be deemed excessive merely because the person under indictment cannot give the bail required of him. 3 Cal.Jur., p. 1049, § 18.

Petitioner refers to the order of this court in the case of Ex parte Carey, Crim. 987. In that case it appears that the petitioner was duly convicted of the crime of rape. The trial court fixed bail pending appeal at $140,000 bond or $70,000 cash. Carey petitioned this court for a reduction in bail, upon a petition substantially identified with the one filed in the present action. The court, from the bench, without opinion, reduced the bail to $15,000. The reasons for such reduction do not appear. For that reason that case cannot be considered as a binding precedent in the present proceeding.

For the foregoing reasons the petition for reduction of bail is denied and the writ heretofore issued is discharged.

We concur: WARD, J.; GOODELL, J. pro tem.

---

35 Cal.App.2d 397

PEOPLE v. MUNZIE.

Cr. 1697.

District Court of Appeal, Third District, California.

Nov. 8, 1939.

Criminal law 🔑1182

A judgment of conviction was affirmed where transcript was filed in District Court of Appeal on September 7, 1939, and no brief was filed in behalf of appellant, and cause was regularly placed on calendar for oral argument on November 8, 1939, and no appearance was made for appellant at the time the case was called for hearing. Pen. Code, § 1253.

◆

Appeal from Superior Court Stanislaus County; Roy B. Maxey, Judge.

Ton Munzie, whose true name was Tony Munize, was convicted of violating an act regulating the sale and use of poisons in the State of California, and he appeals.

Affirmed.

Fowler & Fowler, of Modesto, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Stanislaus county of the crime of violation of an act to regulate the sale and use of poisons in the state of California, a felony.

The transcript on appeal was filed in this court September 7, 1939. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on November 8, 1939. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.

---

35 Cal.App.2d 375

PETERSON v. WOLFER PRINTING CO.

Civ. 12320.

District Court of Appeal, Second District, Division 2, California.

Nov. 6, 1939.

Rehearing Denied Nov. 24, 1939.

1. Master and servant ⚷80(10)

In action by former employee of corporate employer for amount allegedly due for services rendered, evidence sustained judgment for the employer on ground that no oral agreement to pay a cash bonus to employee was made by employer.

2. Account, action on ⚷2

Employee who brought action for amount allegedly due for services rendered by the employee for corporate employer, and who failed to state a cause of action based upon a stock bonus agreement could not recover upon an open book account containing only entries based upon such agreement.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by George Peterson against the Wolfer Printing Company to recover an amount alleged to be due to the plaintiff for services rendered for the defendant. From an adverse judgment, the plaintiff appeals.

Affirmed.

Raphael Dechter and Harry A. Pines, both of Los Angeles, for appellant.

Daily & Gallaudet, of Glendale, for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover from defendant corporation the sum of $3,400 alleged to be due him for services rendered. Four causes of action are set forth in the complaint, each based upon a common count. Findings and judgment were in favor of defendant and plaintiff prosecutes this appeal from the judgment.

Defendant corporation was in March, 1934, engaged in the printing business and plaintiff was manager of the engraving department. W. Rankin Good and H. H. Porter each owned one-half of the corporate stock, Mr. Good being president of the corporation. On March 28, 1934, Good and Porter entered into an agreement whereby Good agreed to buy Porter's stock, which Porter agreed to sell. At about the same time plaintiff received a letter dated March 27, 1934, signed by Wm. Rankin Good, as follows: "George Peterson Los Angeles, California Dear Sir: This corporation considers you a valuable and faithful employee and trust that you will in the future, as in the past, continue to well and faithfully serve us in your present capacity. This corporation has entered into an agreement whereby it expects to acquire certain capital stock of the Wolfer Printing Company at the end of approximately 67 months from the present time. If it is able to acquire that stock, it will at the end of 67 months deliver to you 50 shares of stock as a gift for your valued services. Yours truly, W. Rankin Good."

Good entered into an agreement with the corporation on April 28, 1934, by which he agreed to transfer to the corporation 150 shares of the stock which he was to receive from Porter under their agreement, to which agreement reference was made. The agreement of April 28th indicates that the 150 shares of stock were to be transferred to the corporation in order to enable the corporation to carry out a bonus plan which, the agreement recites, had been established. In July, 1936, Good acquired all of the stock which had been owned by Porter, but it does not appear whether any of this stock was ever transferred to the corporation. In July, 1937, plaintiff voluntarily terminated his employment with the corporation and in August, 1937, filed the present action. Between April, 1934, and September, 1937, periodical entries were made in defendant's account books showing monthly bonus credits to plaintiff's account. These entries were based upon the original journal entry which was: "To credit employee with bonus from April 1, 1934, to December 31, 1934, per agreement on file, being 9/67ths of $6,000.00 and of $12,000.00 respectively." These entries were made for the purpose of complying with various tax requirements.

The present action was not brought for the purpose of recovering the stock bonus provided for in the agreement of March 27, 1934, nor is it an action to recover damages for an alleged breach of that agreement. On the contrary, plaintiff seeks to recover upon one or more common counts based upon an alleged subsequent oral agreement to pay a cash bonus instead of a stock bonus, or upon the entries in defendant's account books, which, he contends, show that the amount sued for had been credited to plaintiff's account.

[1] The trial court found that the various allegations which form the basis of the various common counts are not true and specifically found "that on or about April 1, 1934, defendant promised and agreed to give to plaintiff on November 1, 1939, a bonus of stock and not of money upon condition that plaintiff continued in the employ of defendant and rendered faithful services for the defendant at all times between on or about said April 1, 1934 and November 1, 1939". Plaintiff's contention that this finding is not supported by the evidence cannot be sustained. He bases his contention mainly upon his own testimony in which he stated that he had requested a salary increase in the presence of the general manager of the corporation and was informed by the vice-president, W. Rankin Good, Jr., that he could not have an increase in salary because of the bonus arrangement which itself represented a substantial increase. Plaintiff thereupon said that he had expected a stock bonus and knew nothing of a cash bonus, and the vice-president said, according to plaintiff's testimony, that the corporation had no intention of giving him a stock bonus but intended to give him a cash bonus and that they would be willing to arrange semimonthly payments of some kind. Plaintiff then said that such arrangements would be satisfactory with him provided it was presented in proper form. A few days later a written form of a proposed employment agreement was presented to plaintiff, which provided for a cash bonus to be paid to plaintiff in monthly instalments if plaintiff remained in the employ of the corporation for two and one-half years from June 1, 1937. Plaintiff refused to sign this agreement.

In his testimony the vice-president denied that he had ever stated that the corporation would not give to plaintiff a stock bonus. The general manager of the corporation testified that at the conference which followed plaintiff's request for an increase the vice-president told plaintiff that he could not have an increase because of the bonus arrangement; that at that time plaintiff stated that he was building a house and needed the money and would like to have his bonus money; that the vice-president replied that some arrangement might be made and that the corporation had never intended to pay the bonus in stock but intended to pay it off in cash. Leaving out of consideration the question concerning the authority of the vice-president to bind the corporation in the matter and also leaving out of consideration the vice-president's testimony in which he denied that he had stated that the corporation did not intend to give the plaintiff a stock bonus, it must nevertheless be held that the evidence is sufficient to sustain the trial court's finding that no oral agreement to pay a cash bonus was ever made. The trial court was justified in concluding that the parties were willing to discuss the matter of a cash bonus in order to reach an agreement but that in fact no definite or final agreement was reached. It appears without conflict that the proposed cash bonus was to be arranged and presented to plaintiff in suitable form. The written form of employment contract, embodying a cash bonus arrangement, which was presented to appellant is further evidence of the fact that the definite arrangements as to the cash bonus had not been agreed upon orally and that it was the intention of the parties that such arrangements were to be embodied in a written contract in a manner agreeable to both parties. Since this contract was never executed by the parties no agreement concerning a cash bonus was ever consummated.

[2] The evidence is also sufficient to sustain the trial court's finding that defendant did not become indebted to plaintiff on an open book account. It is important to note that the original journal entry crediting plaintiff's bonus account specifically referred to an agreement on file. The only bonus agreement on file was the agreement of March 27, 1934, which provided for a stock bonus at the end of 67 months. The expert accountant who set up the account testified that such entries were made periodically in order to comply with tax requirements. Since plaintiff has failed to state a cause of action based upon a stock bonus agreement, he cannot recover upon an open book account which contains nothing more than entries based upon such agreement.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

---

35 Cal.App.2d 380

SOUTHERN PAC. CO. et al. v. RIVERSIDE COUNTY.

Civ. 2444.

District Court of Appeal, Fourth District, California.

Nov. 6, 1939.

Hearing Denied Jan. 4, 1940.

1. Statutes 🔑189, 208

In the interpretation of statutes, courts are not bound by grammatical rules and may ascertain meaning of words by context.

2. Statutes 🔑183, 184

While the intention of the Legislature must be ascertained from words used to express it, manifest reason and obvious purpose of law should not be sacrificed to a literal interpretation of words.

3. Statutes 🔑206

Every clause and word of a statute should be given effect and meaning. Code Civ.Proc. § 1858.

4. Statutes 🔑209

If the terms "land," "lands," "property," "lot or parcel of land," "land or any improvements thereon," and "real property," as used in Storm Water District Act, have similar meanings which may be applied to them without doing violence to act, such definitions should be adopted so as to do away with apparent inconsistencies in act. Gen.Laws 1937, Act 6176, §§ 1, 2, 4, 5, 8, 11–13, 16, 25, 26d, 26e, 27, 28.

5. Levees and flood control 🔑23
Statutes 🔑225

The Code provision that "land" is the solid material of the earth, if strictly construed, would not include fixtures attached to land; but definition must be considered in connection with provision that owner of land in fee has right to surface and to everything permanently situated beneath and above it, as respects right of a storm water district formed for the protection of "land" to assess taxes against improvements on railroad property. Gen.Laws 1937, Act 6176; Civ.Code, § 659.

[Ed. Note.—For other definitions of "Land," see Words & Phrases.]

6. Fixtures 🔑21

Fixtures become a part of the land and pass to a purchaser with the fee of the land. Civ.Code, § 660.

7. Levees and flood control 🔑23

The word "land," as used in Storm Water District Act, is synonymous with the term "real property," which includes land, that which is affixed to land, that which is incidental or appurtenant to land, and that which is immovable by law, as respects right of a storm water district to assess and tax improvements on land as part of the land. Civ.Code, § 658.

[Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

8. Levees and flood control 🔑23

Where the Storm Water District Act purports to give right to assess and tax "property" in district, Legislature only intended to confer right to tax "real property" and not "personal property," where legislative intent was made evident by more frequent use of terms "land" and "real property" than "property" and fact that word "property" in several places in act was qualified by words showing intention to tax only "land" and "real property." Gen.Laws 1937, Act 6176.

[Ed. Note.—For other definitions of "Personal Property" and "Property," see Words & Phrases.]

9. Constitutional law ⚷48
Statutes ⚷174

Courts must, where possible, hold legislative enactments constitutional and must construe them so they may be understandable and workable.

10. Statutes ⚷184

In construing statutes, courts must be governed by intent and purpose of entire act rather than by definition of a particular word used in it.

11. Statutes ⚷200

Where context of a statute, or other considerations arising therefrom, show that a word was erroneously used by Legislature for another word which, if substituted, will harmonize the statute with its obvious purpose and intent, statute will be read as though intended word had been used.

12. Pleading ⚷204(2)

In action to recover taxes paid under protest, a demurrer to the entire complaint should not have been sustained where complaint stated a good cause of action for refund of part of the money sought to be recovered.

13. Appeal and error ⚷102

An "order" sustaining a demurrer to a complaint is not "appealable." Code Civ. Proc. § 963.

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

◆

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action to recover taxes paid under protest by the Southern Pacific Company (a corporation) and the Southern Pacific Railroad Company (a corporation), against the County of Riverside. From an order sustaining demurrer to complaint, and from judgment, the plaintiffs appeal.

Judgment reversed; attempted appeal from order sustaining demurrer dismissed.

Hearing denied; EDMONDS, J., dissenting; CARTER, J., not participating.

W. I. Gilbert, of Los Angeles, for appellants.

Earl Redwine, of Riverside, for respondent.

MARKS, Justice.

This is an action to recover $1,540.58, taxes paid under protest to defendant for the use of the Coachella Valley Storm Water District. A demurrer was sustained to the complaint. Plaintiffs failed to amend within the time allowed and the judgment from which this appeal is taken was entered. The grounds of special demurrer are not argued. We therefore assume they have been abandoned.

The Coachella Valley Storm Water District, which we will refer to as The District, was organized under the Storm Water District Act of 1909, Stats. 1909, p. 339, as amended, Deering's Gen.Laws 1937, Act 6176. Certain pertinent facts of its organization and early activities are set forth in Southern Pacific R. Co. v. Stibbens, 103 Cal.App. 664, 285 P. 374, and will not be repeated here.

Plaintiffs paid, under protest, both instalments of taxes for the fiscal year 1936–37. The protest to the first instalment went to the following items: $428.20 for current expenses for the maintenance and improvement of the works of The District, assessed and levied on personal property of plaintiffs; $278.09 for like current expenses assessed and levied on the improvements of plaintiffs; $278.09 for like current expenses assessed and levied on the improvements of plaintiffs (this would seem to be a duplication which is not repeated in the complaint); $278.09 for payment of bonds and interest, assessed and levied on the improvements of plaintiffs. The protest to the second instalment went to items totaling $556.20, composed of the following: $278.10 for current expenses for the maintenance and improvement of The District, assessed and levied on the improvements of plaintiffs; $278.10 for payment of bonds and interest of The District assessed and levied on the improvements of plaintiffs.

For the purposes of this opinion we will assume that the "improvements" which were assessed, consisted of buildings, tracks, and other such things which had been firmly and permanently attached to the soil and which were in the nature of fixtures.

Plaintiffs urge that the Storm Water District Act of 1909 only permitted the assessment and taxation of their *lands* for district purposes; that the term "land" is there used in its narrowest sense, to indicate the ground alone, and does not include fixtures or like "improvements"; that the act does not permit the assessment and taxation of any of their personal property, fixtures or improvements. They further urge that these questions were determined and settled in their favor by this court in the case of Southern Pacific R. Co. v. Stibbens, supra.

A study of the Storm Water District Act of 1909 discloses a loose, indiscriminate and somewhat confusing use of the terms "land", "lands", "owners of land", "property", "freeholder", "lot or parcel of land", "land or any improvements thereon", and "real property". We believe that a brief summary of those sections of the act where those terms appear is necessary to the solution of the problem presented. The emphasis hereafter appearing is ours.

Section 1 of the act deals with the preliminary proceedings leading up to the formation of a district. It is there provided that a district may be formed for the protection of "lands" within its boundaries; that it may include within its exterior boundaries "land" lying within incorporated territory and "land" in unincorporated territory; that a petition for organization of a district must be signed by not less than twenty-five per cent of the "owners of land" therein; that where the area to be organized into a district lies in one county the petition must be presented to the board of supervisors "in which said land lies"; that where it lies in more than one county it must be presented to the board of supervisors of the county in which "the greater area of such land lies".

Section 2 provides for giving notice of intention to form a district. It is there provided that the notice "* * * shall state that it is proposed to assess all *property* embraced in said proposed storm-water district * * *". This section also provides that the assessor shall certify to the county clerk "* * * the name of each owner of *land* in the proposed district" to whom a notice shall be sent.

Section 4 provides for a hearing and action by the board of supervisors on the petition. It also provides "that no such district shall be formed wherein a majority of the owners of *property* * * *" object.

Section 5 provides that the governing body of the district shall consist of three trustees, each trustee to be a "freeholder" of the district, with one trustee an "eligible *freeholder*" in the unincorporated portion of the district, if there be such portion.

Section 8 defines the powers of the district and provides for its contracts and emergency work. The district is given the power, among other powers, to protect the "*lands*" within its boundaries from damage.

Section 11 concerns itself with the functions of commissioners who are required to view the "land" to be taken for improvements, to estimate its value and the damage to "property" affected thereby; to assess the value of the "lands" taken and damage to "property" upon the "*lands*" embraced within the boundaries of the district. After crediting any appropriation to the cost of the work made by a county or counties, the commissioners shall assess the balance necessary to construct the improvements "upon the *lands* in said district in proportion to the benefits * * * including in said assessment the *property* of any railroad company within said district, if such there be".

Section 12 provides for the report of the commissioners. It concerns itself with "the *land* assessed"; "each lot or parcel of *land* to be taken, damaged or assessed"; "each lot, or parcel of *land* to be assessed" and "the amount assessed against each such piece or parcel of *land*".

Section 13 directs the commissioners, in their assessment, when they are in doubt as to the "ownership of any lot or parcel of *land* or any *improvement thereon*, or of any interest in such *land* or *improvement*", to set it down "as belonging to unknown owners".

Section 16 gives the trustees of a district power to extend payments of assessments over a period of years where the cost of the improvements is "too great to be raised in one year by assessment against the *property*" in the district. It further provides that the first assessment against "each parcel of *land*" shall become due immediately and that the assessments "against each parcel of *land* shall constitute a lien thereon"; that deferred assessments "on any parcel of *land*" may be paid at any time. It is also provided that in case the district shall be situated in more than one county the report, assessment and plat shall be filed with the tax collector of each county and each tax collector shall "proceed as to the *property* in said district within his own county in the manner hereinafter directed, and the assessment on the *property* in said county shall be collected in the manner hereinafter directed".

Section 25 contains the following: "Where new or additional improvements have been constructed other than those which have been constructed under the first proceedings had for that purpose, all moneys required for the maintenance and repair of such improvements shall be chargeable and collected only as against *the land* which originally bore the cost of such improvements. Such board or boards of supervisors shall at the time of making the levy of taxes for county purposes for that year, levy a tax upon *the property* in their county in said district sufficient in amount to raise the sum estimated by the board of trustees to be necessary."

Section 26d provides that the bonds shall be "a lien upon the *property* of the district" and that their principal and interest "shall be paid by revenue derived from an annual assessment upon the *real property* of the district; and all the *real property* of the district shall be and remain liable to be assessed from such payments".

Section 26e requires the board of supervisors to "levy a tax upon the *real property* in their county in said district, sufficient in amount to raise the sum estimated by the board of trustees to be necessary".

Section 27 provides for the disincorporation of a district and requires a petition "signed by a majority of the *land* owners" to initiate the proceedings.

Section 28 provides for the exclusion from, or inclusion in the district, of *property* upon a petition signed by "owners of *land*".

From this review of some of the provisions of the Storm Water District Act of 1909 it is clear that it is necessary for us to determine the intention of the legislature in using such terms as "land", "property", and "real property", and the meaning which must be given them, as on the face of the act at least some of the provisions are conflicting. In doing this a statement of some of the principles of statutory construction which must guide us seems advisable.

In the case In re Washer, 200 Cal. 598, 254 P. 951, 954, the Supreme Court said:

"We are mindful of the rules of construction which must bind us, which said rules are as follows:

"'Absurd or unjust results will never be ascribed to the Legislature and it will not be presumed to have used inconsistent provisions as to the same subject in the immediate context. The courts will be astute to avoid such results. Wells Fargo & Co. v. Mayor etc. of Jersey City (D.C.), 207 F. 871. In the interpretation of statutes courts are not bound by grammatical rules, and may ascertain the meaning of words by the context. Cavender v. Hewitt, 145 Tenn. 471, 239 S.W. 767, 22 A.L.R. 755.

[1, 2] "'"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. 'While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words.' Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions. Where general language construed in a broad sense would lead to absurdity it may be restrained. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act." Lewis' Sutherland on Statutory Construction (2d Ed.) § 376, p. 721.' In re Haines, 195 Cal. 605, 613, 234 P. 883, 886."

[3] In Fresno City High School District v. DeCaristo, Cal.App., 92 P.2d 668, 671, it was said: "It is a cardinal rule of construction that, where possible, every clause and word of a statute should be given effect and meaning. Sec. 1858, Code Civ.Proc.; Smith v. State Board of Control, 215 Cal. 421, 10 P.2d 736; County of Los Angeles v. Graves, 210 Cal. 21, 290 P. 444; Crowe v. Boyle, 184 Cal. 117, 193 P. 111; Gill v. Johnson, 103 Cal.App. 234, 284 P. 510; Cory v. Cooper, 117 Cal.App. 495, 4 P.2d 581. It is equally true that in construing the component parts of a legislative act the courts should, where possible, give force and effect to each so that the whole act may have life and vitality. Ahern v. Livermore Union H. S. Dist., 208 Cal. 770, 284 P. 1105; In re Haines, 195 Cal. 605, 234 P. 883; People v. Rabe, 202 Cal. 409, 261 P. 303."

[4] From the foregoing rules it is clear that if the terms we are considering have similar meanings which may be applied to them without doing violence to the lan-

guage of the statute we should adopt those definitions so as to do away with apparent inconsistencies in the act.

[5, 6] "Land" is defined by section 659 of the Civil Code as "* * * the solid material of the earth". It is clear that this definition, strictly construed, does not include fixtures attached to the land. This definition must be considered in the light of section 829 of the Civil Code, which provides that "The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it." These sections codify part of the common-law doctrine of fixtures. It is stated in section 660 of the same code that, "A thing is deemed to be affixed to land when it is attached to it by roots * * * or imbedded in it * * * or permanently resting upon it * * *." This definition assists in determining when personalty "is deemed to be affixed to land" so that it becomes a part of it. See Miller v. Waddingham, 3 Cal.Unrep. 375, 25 P. 688, 11 L.R.A. 510; Miller v. Waddingham, 91 Cal. 377, 27 P. 750, 13 L.R.A. 680. It is thoroughly settled that fixtures become a part of the land and pass to a purchaser with the fee of that land. Thus, perhaps, we find a reason for the rather common use of the word "land" to include not only "the solid material of the earth" but also fixtures and that which is incidental or appurtenant to the land. See Black's Law Dictionary 723; Webster's New International Dictionary, p. 1209; 50 Cor.Jur. 752; 22 R.C.L. 55. In the last-cited authority it is said: "The word 'land' both in England and here is a word of art. It is nomen generalissimum and includes, not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences. While it generally refers to something corporeal, it may include a franchise connected with land. This is the broadest of the two common law meanings of the term. * * * Ordinarily, however, the term is used as descriptive of the subject of ownership and not the ownership. Thus, in its broadest sense it will be seen that 'land' in its legal signification embraces much more than the word literally imports, and includes many things besides the soil itself, as waters, grass, stones, buildings, fences, trees, and the like, and in fact all things which have become a part of the soil."

Thus we find that the term "land" has a definite and well-accepted meaning that is synonymous with the term "real property", defined by section 658 of the Civil Code as including: "1. Land; 2. That which is affixed to land; 3. That which is incidental or appurtenant to land; 4. That which is immovable by law * * *," with certain specified exceptions.

[7] With these definitions in mind we find no difficulty in concluding that the legislature, in the Storm Water District Act of 1909, used the terms "land" and "lands" as interchangeable and synonymous with the term "real property". By so holding we remove seeming inconsistencies in the act, harmonize its terms, bring them into a state of conformity and make them easily applicable in the matter of taxation, except where the word "property" is used.

"Property" has a much broader meaning than does "land" or "real property". It is thus defined in Black's Law Dictionary: "The word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate." Thus we find that there is another apparent conflict in the terms of the act. In places it seemingly limits the taxing power to the taxing of "land" or "real property", and elsewhere it apparently gives the power to tax "property". These conflicts seem particularly apparent in the portion of section 25 which we have already quoted and in section 26d of the act.

The portion of section 25 with which we are here concerned applies only in a case where additional improvements have been constructed to supplement the original works. It is there first provided that the cost of maintenance and repair of those additional improvements "shall be chargeable and collected only as against the *land* which originally bore the cost of such improvements". In the next sentence it is provided that the taxes to pay for such additional improvements shall be levied "upon the *property*" in the district.

Section 26d has to do with bonds issued by the district. It is first provided that such bonds shall be a lien upon the "*property*" in the district. It is next provided that the "*real property*" in the district shall be assessed to pay the principal and interest of the bond issue and that such *"real property* * * * shall be and remain liable to be assessed from such payments".

When we consider the act as a whole we think it rather clear that the legislature intended to make only real property assessable for the purposes of taxation by a district. This is made evident by the much more frequent use of the terms "land" and "real property" than the use of the word "property" and by the further fact that in several places where "property" is used that word is qualified by other expressions showing the clear intention to tax only "land" or "real property".

[8-10] We therefore conclude that where the Storm Water District Act of 1909 purports to give the right to assess and tax the "property" in the district, the legislature only intended to confer the right to tax "real property". It is well settled that courts must, where possible, hold legislative enactments constitutional and must construe them so they may be understandable and workable. In so doing we are not bound by a word which was mistakenly used in a sense not justified by the context. We must be governed by the intent and purpose of the entire act rather than by the definition of a particular word used in it. In 23 California Jurisprudence 738, it is said:

[11] "In accordance with the settled rule that courts, when possible, construe statutes so as to carry out the legislative intent, a statute will be read as apparently intended, regardless of mistakes, errors or omissions therein. It is not the duty of courts, by a blind adherence to the letter of the law, to perpetuate mistakes inadvertently made by the lawmaker. Accordingly, where the context of a statute, or other considerations arising therefrom, show that a word was erroneously used by the legislature for another word which, if substituted, will harmonize the statute with its obvious purpose and intent, the statute will be read as though the intended word had been used."

Plaintiffs urge with great force and sincerity that by the decision in the case of Southern Pacific R. Co. v. Stibbens, supra, we have established that, under the Storm Water District Act of 1909, only the land, meaning "the solid material of the earth", may be assessed and taxed for district purposes and that improvements on the land cannot be taxed. Counsel bases his argument on the fact that we used the term "land" exclusively throughout the opinion when speaking of that which might be assessed and taxed, and stresses the following quotations from that opinion [103 Cal. App. 664, 285 P. 376]:

"The assessment, which is composed of the cost of the improvements, including any damages that may be awarded, 'shall be made upon the lands in said district in proportion to the benefits to be derived by such lands from said improvements, including in said assessment the property of any railroad company within said district, if such there be.' Section 11, Storm Water District Act of 1909. The word 'property,' as used in this quotation, must be held to refer to, and include only, 'land,' as it is clear from the act that no property other than land is to be assessed under its terms. * * *

"Appellant further complains of the assessment levied because it insists that it includes the franchise, roadway, roadbed, rails, and rolling stock of the company. We do not so read the assessment in the record before us. The assessment is copied in full and shows only a strip of land 165 feet wide through various sections described, with an amount in money following each of the several parcels described. We cannot construe this to be an assessment on anything more than it shows. From all that appears in the records, the amounts entered are the benefits charged against the lands described in the report of the commissioners and approved by the trustees of the district."

We have again carefully reviewed the record in the Stibbens case and find that the question confronting us here, which is, whether the land (defined as the solid material of the earth) without the improvements on it, or the land with the improvements on it, or land, improvements and personal property, might be assessed and taxed, was neither presented nor considered there. It should be sufficient to say that when we used the term "land" in that opinion, we used it in the sense and with the meaning which we have given it in this opinion, and which we believe the legislature intended in the Storm Water District Act of 1909 as being the equivalent of and interchangeable with the term "real property". However, it is rather clear from the first quoted paragraph of the opinion in the Stibbens case that we did not then, as we do not now, regard personal property taxable for the purposes of the district.

[12] As it appears from the complaint that plaintiffs paid, under protest, the sum of $428.20, in taxes, levied on their personal property, the pleading stated a good cause of action for the refund of that sum of money. It follows that the demurrer, which was to the entire complaint, should not have been sustained.

[13] Plaintiffs have attempted to appeal from the order sustaining the demurrer to their complaint. Such an order is not appealable. Sec. 963, Code Civ.Proc.

The judgment is reversed. The attempted appeal from the order is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

---

35 Cal.App.2d 390

KERR GIFFORD & CO. v. AMERICAN DISTILLING CO.

Civ. 11015.

District Court of Appeal, First District, Division 2, California.

Nov. 8, 1939.

1. **Principal and agent** 🔑103(2)

Where an individual acted as a special agent in all that he did regarding two purchases of spot corn from plaintiff for defendant, plaintiff could not contend that those facts conferred on individual apparent authority to deal in futures. Civ.Code, § 2297.

2. **Principal and agent** 🔑123(3)

Even if evidence of purchases of spot corn by defendant from plaintiff was properly admitted to prove that defendant's special agent authorized to carry out contracts had ostensible authority to purchase futures a month later, that evidence did not justify disturbing finding that agent did not have such authority, where plaintiff retained agent's confirmation of sale and made no inquiry concerning authority, though plaintiff's office was near defendant's office and agent had signed his own name without purporting to sign as "agent," and plaintiff's attorney notified defendant that corn was being shipped after plaintiff had been advised of agent's lack of authority. Civ. Code, § 2334.

3. **Principal and agent** 🔑174

Whether defendant, in a letter to plaintiff, ratified an unauthorized contract of its special agent to purchase futures in corn was a question of fact.

4. **Appeal and error** 🔑1008(3)

Construction of letter relied on to show ratification by defendant of an unauthorized contract entered into with plaintiff by defendant's special agent, was for trial court, and unless that court abused its discretion, its construction could not be disturbed by the reviewing court.

5. **Principal and agent** 🔑137(1)

Where defendant's president, as soon as he was advised of plaintiff's claim that defendant's special agent had entered into a contract to purchase futures in corn, repudiated purported contract while it was still executory, but defendant fully performed an agreement to take the corn, examine it, accept such as was marketable, and pay market price therefor and expressly reserved settlement of question about a different price having been set by agent's purported contract, defendant was not estopped from contending that agent had no ostensible authority to enter into contract.

6. **Evidence** 🔑471(28)

Where plaintiff's counsel on cross-examination of defendant's witness read to witness a long paragraph contained in defendant's answer and asked witness whether answer was incorrect in alleging that there was an express agreement between the parties, objection that question called for a conclusion of the witness was properly sustained on ground that it was for the court to find whether there was an express agreement under all the evidence in the case.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Kerr Gifford & Company against the American Distilling Company to recover an alleged balance due on the sale of a quantity of corn. From a judgment for defendant, plaintiff appeals.

Affirmed.

Carl R. Schulz, of San Francisco, for appellant.

Norman A. Eisner, of San Francisco, for respondent.

STURTEVANT, Justice.

In this action the plaintiff sued to recover an alleged balance claimed to be due on the sale of a quantity of corn. The trial court made findings in favor of the defendant and from a judgment entered thereon the plaintiff has appealed.

In its complaint the plaintiff alleged: "That on or about July 14, 1937, plaintiff agreed to sell to defendant and defendant agreed to purchase from plaintiff 500 short tons of 2,000 lbs. each of Argentine corn in bulk, to be of fair average quality, 1937 crop, for a price of $2.02½ per 100 lbs., f. o. b. cars Oakland elevator, Oakland, California, shipment from elevator as instructed by buyer, 10 days free storage after arrival and 15¢ per ton per month storage to be paid to defendant on any undelivered portion thereafter." The defendant denied the foregoing allegations and pleaded affirmatively certain new matter.

The plaintiff contends that all findings predicated on the existence of any terms of sale or agreement, other than alleged in its complaint and as set forth above, are contrary to the evidence. On the trial it produced a document in words and figures as follows:

"Kerr Gifford & Co. Inc.
"San Francisco, California
"July 14, 1937. No. 51.
"The American Distilling Company
"369 Pine Street,
"San Francisco, California.
"Gentlemen:

"We confirm sale of the following to you:

Quantity	Five hundred (500) tons of 2000 lbs.
Commodity	Argentine corn—f.a.q. (bulk) 1937 crop.
Price	$2.02½ per cental—net cash against bills of lading and weight certificates.
Basis	f.o.b. cars Oakland Elevator, Oakland, California. (shipment from Elevator as instructed by buyer)
Shipment	S. S. 'West Cactus' or substitute—July 1937 shipment from the Argentine.
Remarks	Ten days free storage after arrival—15¢ per ton per month on undelivered portion thereafter.
(Signed)	Kerr Gifford & Co., Inc., by W. S. Bell. Accepted by S. McTigue."

As said document was not signed by it the defendant contended it was not an enforceable contract against the defendant. Civ.Code, § 1624a. However, the plaintiff introduced other evidence. It showed two sales of spot corn made by plaintiff to defendant in the preceding month. Mr. McTigue, in behalf of and with the express approval of the defendant, wrote to the plaintiff on September 14, 1937, a letter as follows:

"Gentlemen:

"Replying to your letter of September 10, 1937. I personally had a definite agreement with your agent Mr. Fred P. De Hoff, that the corn would only be taken at the market price at the date of each car delivery, and that each car would have to be approved as to quality based upon sample to be furnished to us. In other words, the purchase was to be made as we had heretofore made them from you, and quality would have to meet our requirements.

"I had never purchased and was not authorized to purchase corn futures on behalf of the American Distilling Company. I of course, do not know who made out the confirmation sale, and it was a complete oversight on my part in not observing that the guarantee against price decline and provision for quality were not properly expressed. I had entirely relied upon De Hoff.

"The American Distilling Company is willing to take this corn at the market price provided it complied in quality, within a period of 30 days. The company has already asked you to ship one car of 80,000 pounds, and is now ready to take another, subject to approval of sample.

"The price is to be the present market price of $1.92½ per cwt., f. o. b. Oakland, for the car now needed.

"The American Distilling Company is willing to carry out what I agreed to do and hereby offers to take from you 500 tons of Argentine Corn, 1937 crop, subject to approval of sample, within 30 days from this date at the prevailing market price at the time of delivery of each car as ordered. This was my agreement with Mr. De Hoff.

"If you are unwilling to furnish us with corn in accordance with the above terms we shall be obliged to buy on the market elsewhere.

"Please advise us by return mail, what you propose to do so that we may govern ourselves accordingly.

"Yours truly,

"S. McTigue."

The letter was answered on September 25, 1937, by Mr. Schulz, acting as the attorney for the plaintiff. His letter was as follows:

"Gentlemen:

"I wish to confirm conversation with Mr. McTigue today pursuant to which Kerr Gifford & Company is shipping one car of corn to Waldo, Marin County.

"This car is being shipped by Kerr Gifford pursuant to its understanding of its contract with you of July 14, 1937, their confirmation, number 51. We understand that you are instructing shipment under the terms of a different arrangement set forth in your letter of September 14, 1937.

"It is my further understanding that this car is shipped by Kerr Gifford & Company, and if accepted by you, so accepted without prejudice to the respective claims under the contract, but to minimize the loss to the parties arising out of the dispute.

"I desire that it be particularly clear that in shipping this car there is no waiver of any term of the confirmation dated July 14, 1937, Number 51, but on the other hand acknowledge that acceptance of the car does not prejudice your right to claim a different contract based on your letter of September 14, 1937.

"I am delivering a copy of this letter to you and to Kerr Gifford at this time, in order that there may be no misunderstanding prior to the movement of the car.

"Yours very truly,

"Carl R. Schulz.

"CC Kerr Gifford & Company
Merchants Exchange Building."

After those letters were written the plaintiff caused to be delivered and the defendant received 500 tons of corn and paid the market price therefor. In this action the plaintiff seeks to recover judgment against the defendant for the difference between the purchase price, as set forth in the confirmation dated July 14, 1937, and the amount paid by the defendant.

[1] The plaintiff claims that McTigue had ostensible authority and it calls attention to the two sales of spot corn. The defendant calls attention to the fact that both of the sales were of spot corn and that neither involved the purchase of futures, that both purchases were made by defendant's president personally and that McTigue was merely authorized to carry out the contracts made by said president, and that there was sworn testimony that McTigue had no authority to sign the confirmation dated July 14, 1937. It further relies on the proposition that, although both parties maintain offices in San Francisco, the plaintiff made no inquiry to ascertain the powers of McTigue. Both distinctions are well founded. In Davis v. Trachsler, 3 Cal.App. 554, 86 P. 610, 612, at page 559, the court said: "The appellant having actual notice of the agency, it was incumbent on him to ascertain the scope of the authority possessed by Hopkins (Solari v. Snow, 101 Cal. 387, 35 P. 1004), and whether he had any right to make contracts of sale and especially the kind he made with appellant. [Citing authorities.]" See, also, Ernst v. Searle, 218 Cal. 233, 239, 240, 22 P.2d 715. In all that McTigue did regarding the two purchases of spot corn he acted as a special agent. Civ.Code, sec. 2297. The plaintiff was not entitled to claim that such facts conferred on him apparent authority to deal in futures. Davis v. Trachsler, supra; McCord, etc., Furniture Co. v. Wollpert, 89 Cal. 271, 274, 26 P. 969; Merriam v. De Turk, 66 Cal. 549, 6 P. 424; Tomasini v. Smith, 26 Cal.App. 227, 146 P. 691; Hibernia Sav., etc., Soc. v. Dickinson, 167 Cal. 616, 624, 625, 140 P. 265; Post v. City and County Bank, 181 Cal. 238, 244, 183 P. 802.

[2] Conceding solely for the purposes of this decision that evidence of the two purchases by the defendant of spot corn was properly admitted for the purpose of proving that McTigue had ostensible authority to purchase futures, such evidence was insufficient to justify this court in disturbing the finding of the trial court on the issue of ostensible authority. Section 2334 of the Civil Code provides: "For acts done under a merely ostensible authority. A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." Although the plaintiff and the defendant had their offices within a few

blocks of each other, although McTigue signed his own name, and although, in doing so, he did not even purport to sign as "agent", the plaintiff retained the confirmation dated July 14, 1937, and made no inquiry as to the authority of McTigue. Its failure to make such inquiry, under the facts, precluded it from claiming that McTigue was exercising ostensible authority. Post v. City and County Bank, supra, 181 Cal. at page 246, 183 P. 802. Moreover, as early as September 14, 1937, the plaintiff was definitely advised that McTigue had no authority "* * * to purchase corn futures * * *." Furthermore, at that time the plaintiff had not "* * * incurred a liability or parted with value * * *" upon the faith of McTigue's acts or at all. But being so advised its attorney wrote the letter dated September 25, 1937.

[3, 4] The plaintiff claims the defendant ratified the purported contract dated July 14, 1937. It relies on the letter written by McTigue with defendant's permission on September 14, 1937. Whether there was a ratification was a question of fact. The facts were those contained in said letters. The construction of those letters rested with the trial court. Unless that court abused its discretion its construction may not be disturbed by this court. The trial court made an implied finding that the purported contract was not ratified. Reading the two letters together we find nothing therein that is at variance with the implied finding. On the other hand we agree with the findings as made by the trial court.

[5] Again, the plaintiff contends (1) that defendant is estopped under the doctrine that quiescence is tantamount to acquiescence and (2) that a promissory estoppel is raised against defendant. The latter replied that the plaintiff's contentions are not supported by the evidence and that an estoppel was not an issue made by the pleadings. Both replies are sufficient. As soon as Mr. Buck, the president of the defendant, was advised of the claim of the plaintiff, he repudiated the purported contract of July 14, 1937, and, as stated above, the court found that no such contract was made. At the time of the repudiation, the purported contract remained wholly executory. At the time of the repudiation the parties, by their correspondence, agreed that the defendant should take the 500 tons of corn, examine it, accept such as was marketable, and pay therefor the market price. The defendant fully performed that agreement. The settlement of the question about a different price having been set by the purported contract of July 14, 1937, was expressly reserved. The record contains no set of facts showing an estoppel against the defendant. The plaintiff cites and relies on Hanna State & Savings Bank v. Matson, 53 Wyo. 1, 77 P.2d 621, 625, and Porter v. Commissioner of Internal Revenue, 2 Cir., 60 F.2d 673, 675. Neither case states any rule contrary to what we have said.

[6] The last point made by the plaintiff is that the trial court erred in rejecting some offered testimony. Walter E. Buck, president of the defendant corporation, was called by the latter as a witness. On cross-examination counsel for the plaintiff read to the witness a long paragraph contained in the answer of the defendant and stated as follows: "'In this connection said defendant alleges that, for the purpose of minimizing damages and under the express agreement that same would be without prejudice to its rights and not an admission of liability under the alleged contract referred to in Paragraph III of said complaint, defendant purchased from plaintiff, and accepted and paid for, at the market prices prevailing at the respective times of deliveries, five hundred tons of corn, on or about the respective dates set forth in said Paragraph IV of said complaint, for which it paid to plaintiff the total sum of sixteen thousand seventy-four dollars.' And I call your particular attention to the fact that it alleges an express agreement. Is the anser incorrect in alleging that there was an express agreement at that time?" An objection was made that the question called for the conclusion of the witness. The trial court sustained the objection, saying: "It is for the court to find as to whether or not there was an express agreement, under all the evidence in the case." That ruling was clearly correct. 11 R.C.L. 565; Schuh v. Oil Well Supply Co., 50 Cal.App. 588, 590, 195 P. 703; Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 427, 213 P. 42, 26 A.L.R. 123.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J., and SPENCE, J.

35 Cal.App.2d 398

JONES v. LEWIS et al.

Civ. 2199.

District Court of Appeal, Fourth District, California.

Nov. 8, 1939.

Contracts ⚷322(5), 350(2, 3)

In action by architect against hotel owners to recover reasonable value of architectural services performed and to foreclose lien therefor upon certain realty, evidence supported trial court's findings that owners agreed to pay architect reasonable value of his work in preparing plans and specifications in connection with proposed remodeling of hotel, that reasonable value of such services was $268, and that agreement between parties was not merely tentative and had not been abandoned by architect.

◆

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Howard E. Jones against Josephine M. Lewis and W. I. Iden and others to recover reasonable value of architectural services performed for defendants and to foreclose a lien therefor upon certain realty. From judgment for plaintiff, the defendants appeal.

Affirmed.

N. C. Peters, of San Bernardino, for appellants.

Raymond E. Hodge, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action to recover the sum of $268 claimed to be due to the plaintiff as the reasonable value of architectural services performed for the defendants and to foreclose a lien therefor upon certain real property. From a judgment in favor of the plaintiff the defendants have appealed.

The only question presented is whether there is sufficient evidence in the record to support certain findings to the effect that the appellants agreed to pay the respondent the reasonable value of his work in preparing certain plans and specifications, that the reasonable value of these services was $268, and that the agreement between the parties was not merely tentative and had not been abandoned by the plaintiff.

The plans and specifications in question were prepared in connection with the proposed remodeling of what was known as the Maryland Hotel. The building was owned by appellant Lewis and the hotel was managed by appellant Iden, although he testified that he had an oral contract under which he claimed to own a 50 per cent interest in the building. The respondent prepared one set of plans for the proposed work, which was not satisfactory. He then prepared another set of plans and specifications which were introduced in evidence and which exhibits have been transmitted to this court. These consist of two sheets of drawings, a blueprint of the same and a set of specifications. The blueprint, with the specifications attached, is signed by Mrs. Lewis as owner.

The respondent testified that he drew these plans and specifications at the request of the appellants; that they were approved by both of them; that a reasonable fee for preparing such plans and specifications is 4 per cent of the lowest bid obtained; that he obtained two bids, the lowest of which was $6,700; that $268 is a reasonable fee for the work done; that he drew up a proposed contract between the low bidder and the owners; that at a conference between this contractor, Mr. Iden and himself the contractor refused to sign the contract; that Mr. Iden then said he would probably have to go out of town to get a builder; that he then told Mr. Iden "my bill of 4% is due at this time"; that Mr. Iden told him to see Mrs. Lewis and she would pay him; and that he saw Mrs. Lewis and she told him she would pay him in three or four days.

The contractor testified that at the abovementioned conversation Mr. Iden made no objection to the plans and specifications as drawn and attempted to persuade him to enter into the contract to construct the improvements, but that he did not do so because he doubted the ability of the appellants to pay for the work. Another architect examined the plans and specifications introduced in evidence and testified that $268 was a reasonable fee for preparing the same.

The testimony of the appellants conflicts in many respects with that offered by the respondent. It may be observed, however, that some of their testimony corroborates that given in favor of the respondent and that other portions plainly indicate why they were not accepted at face value by the trial court. An architect who prepared the plans which were subsequently used by the appellants testified in their behalf. After examining the plans and specifications in evidence he stated that he was unable to tell what was the reasonable value of the services involved in their preparation, although he stated that the testimony of the architect who testified on behalf of the respondent was "substantially correct."

Without reviewing the conflicting testimony, it may be stated that the questioned findings are not only supported by the evidence but, so far as shown by the record, by a preponderance thereof.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

---

35 Cal.App.2d 401

HESS v. MOODEY.

Civ. 2169.

District Court of Appeal, Fourth District, California.

Nov. 8, 1939.

Rehearing Denied Dec. 8, 1939.

Hearing Denied Jan. 4, 1940.

1. Quieting title ⇨10(1)

A plaintiff in a quiet title action must prevail upon the strength of his own title and not upon the lack of title in the defendant.

2. Mines and minerals ⇨41

Under federal statute providing that where a person has held and worked mining claim for period equal to the time prescribed by statute of limitations, for mining claims of state where property is situated, evidence of such possession and working shall be sufficient to establish a right to patent thereto in absence of any adverse claim, "adverse claim" means one arising during period of time in question and before prescribed time has elapsed. 30 U.S.C.A. § 38.

[Ed. Note.—For other definitions of "Adverse Claim," see Words & Phrases.]

3. Mines and minerals ⇨29(5)

In action to quiet title to mining claims, where defendant attacked proof of labor of plaintiff's predecessors for a year prior to defendant's alleged location, he thereby admitted knowledge of prior location and was precluded from attacking its sufficiency. 30 U.S.C.A. §§ 30, 38.

4. Mines and minerals ⇨38(15)

In action to quiet title to mining claims, evidence that mining operations had been carried on, on property under leasing agreement which plaintiff had made with third party, and that when plaintiff and another man attempted to go upon property they were met by defendant's agent who was armed and who threatened to kill them if they took another step forward supported finding that defendant ejected plaintiff from claims. 30 U.S.C.A. § 30.

5. Mines and minerals ⇨38(15)

In action to quiet title to mining claim, evidence showed that at time of defendant's attempted location property was not open for location. 30 U.S.C.A. § 30.

6. Pleading ⇨229, 236(1), 248(1)

Amendments to pleadings are favored except where an entirely different cause of action is attempted to be introduced, and much is left to sound discretion of trial court.

7. Limitation of actions ⇨127(3)

Where complaints in action to quiet title to mining claims were filed within 30 days as required by federal statute, and after 30 days complaint was amended to allege United States citizenship of plaintiff, action was filed within required time, since amendment in no way changed the cause of action. 30 U.S.C.A. § 30.

8. Mines and minerals ⇨38(15)

In action to quiet title to mining claims, evidence showing continued and uninterrupted possession of plaintiff and his predecessors from 1922 up to 1937 supported finding that plaintiff had been in possession for requisite period of time to obtain title by adverse possession. 30 U.S.C.A. § 30.

9. Mines and minerals ⇨38(24)

There is no inconsistency between finding of good record title and finding of good title by adverse possession.

10. Judgment ⇨720

A judgment determining the existence of a particular fact is conclusive upon the parties or their privies whenever the existence of such fact again becomes an issue between them in the same or a different matter in the same or another court.

11. Judgment ⚷627

In action to quiet title to mining claim, the judgment in previous suit brought by defendant against a third party in which it was determined that defendant's claim of location was void was bar to defendant's claim, where privity existed between third party against whom defendant brought action and plaintiff in present action in that they both traced their interest in claims to same predecessor. 30 U.S.C.A. § 30.

12. Trial ⚷51

The practice of trial court of reserving ruling on admission of evidence and closing the case without making any ruling is not to be commended.

13. Appeal and error ⚷1047(2)

In action to quiet title to mining claims, trial court's closing the case without ruling on admissibility of certain evidence offered by plaintiff on which it had reserved its ruling did not constitute reversible error, where defendant's counsel consented to admission upon understanding that if he desired to move for nonsuit or make motion to strike such motions would be considered to have been made at conclusion of plaintiff's case, such motions were not made, and all parties treated evidence as having been admitted.

14. Appeal and error ⚷1047(2)

Where objections to admissibility of evidence should have been overruled, no prejudice resulted from trial court's closing the case without ruling on certain evidence on which he had reserved his ruling.

15. Judgment ⚷747(5)

Mines and minerals ⚷38(15)

In action to quiet title to mining claim, admission of findings and judgment in prior quiet title suit brought by defendant against a third party, a deed granting claims in question to plaintiff, and judgment roll in another case involving claims in which present plaintiff was party, was proper, where such documents were material to plaintiff's chain of title and to the issues on trial. 30 U.S.C.A. § 30.

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Harry M. Hess against H. F. Moodey to quiet title to mining claims. From judgment for plaintiff, the defendant appeals.

Affirmed.

Lester V. Peterman, of Pasadena, and Raymond E. Hodge, of San Bernardino, for appellant.

Duckworth, Harrison & Mussell, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in an action to quiet title to certain mining claims.

Evidence was introduced showing the following facts. On July 1, 1922, one Charles S. Gross filed a location notice describing the land in question with reference to certain other claims and monuments on the ground. The required work upon the claims was performed. Gross was in possession until 1925. One Harry A. Reese obtained from Gross a deed to an undivided one-half interest in the claim. He also procured a quitclaim deed from the divorced wife of Gross. As joint owner, he was in possession until 1928, and thereafter was in charge of the property for Dale Consolidated Mines, a corporation. On February 17, 1928, Gross and Reese executed a trust deed on the property to secure a note for $16,000. Later in 1928, Gross deeded his interest in the claims to Reese who deeded them to the Dale Consolidated Mines, which corporation remained in possession until the plaintiff in this action took possession after a foreclosure and sale under the above-mentioned trust deed. A sale was had under this trust deed and the property was purchased by Esther Wright and a trustee's deed executed to her on October 21, 1932. The plaintiff here took possession of the property for Esther Wright after the foreclosure and then acquired the property from her by deed dated April 19, 1934. He remained in possession, through his son and his tenants until January, 1937.

In the meantime, on May 21, 1932, the Dale Consolidated Mines brought an action against Harry M. Hess, Esther Wright and the trustee named in the trust deed, claiming to be entitled to an extension of the trust deed indebtedness under a certain contract between it and Harry M. Hess. Hess answered, Reese intervened, and Esther Wright later set up her title under the foreclosure sale and asked that her title be quieted against the plaintiff. A judgment was entered on May 24, 1933, decreeing that Esther Wright was the owner of the claims in question. Thereafter she deeded to the plaintiff in this action. Between 1925 and 1931, approximately $96,000 was spent in developing this property, including, among other things, the sinking of shafts to a depth of 360 feet, and the erection of a cyanide plant, a water plant and a mill.

The defendant herein appeared in the picture in 1931. On March 31st of that year he went on the property and filed location notices in which the starting points, lines, distances, and even the names used, are identical with the Gross locations of 1922. He was a real estate agent in Los Angeles and went directly to the property for the purpose of locating it. He testified that he found a map of the property in one of the buildings thereon and that he followed this map in making his purported location and that he was able to locate the boundaries therefrom. He also testified that he did some assessment work in May of that year. On May 4, 1932, he brought an action to quiet title to this property, naming Dale Consolidated Mines and Charles S. Gross as defendants. In that action the court found that the claims were not located by him on March 31, 1931, or at any other time, that the Dale Consolidated Mines was in possession on that date and prior thereto, that the claims were not then open to location, that he knew of the prior location, that his attempted relocation was void, and that he had no interest in the property. This judgment was signed on January 30, 1935, and upon appeal was affirmed on February 10, 1936, by the Circuit Court of Appeals. Moodey v. Dale Consolidated Mines, 9 Cir., 81 F.2d 794.

On February 2, 1937, Moodey applied for a United States patent covering these claims. The plaintiff herein filed an adverse claim and thereafter brought this action pursuant to section 2326 of the Revised Statutes of the United States. 30 U.S.C.A. § 30. The court found in all respects in favor of the plaintiff and this appeal followed.

[1] While it has been heretofore judicially determined that the appellant has no interest in this property he prosecutes this appeal under the established rule that a plaintiff in a quiet title action must prevail upon the strength of his own title and not upon any lack of title in the defendant. He earnestly contends that the evidence and findings are not sufficient to sustain the judgment, and relies upon errors in connection with the admission of evidence.

[2, 3] It is first contended that the location notices filed by Gross in 1922 were filed about two hours too early, during which two hours a prior locator had a right to file proof of labor for the preceding year, and that the location notices contained an insufficient description of the property. The location notices filed by Gross in 1922 stated that the property was bounded by five other mining claims and referred to certain monuments. The location notice filed by the appellant in 1931 uses the same description and he testified that he "reconstructed" the monuments. In Moodey v. Dale Consolidated Mines, supra, the court pointed out that this appellant had in that case attacked the proof of labor performed for the year ending July 1, 1930, that he thereby admitted knowledge of the prior location, that this obviated the necessity for proof of such a prior location, and that he was confined to proof of an abandonment. The same situation exists here where the appellant claimed and is now claiming that no assessment work was performed by the respondent's predecessors between July 1, 1929, and July 1, 1930. The court found, upon sufficient evidence, that such work was performed and the appellant is in no position to attack the original location. With respect to that original location it appears that the claims were owned many years preceding 1922 by the respondent's mother-in-law. While she had an additional two hours in which to file proof of work for that year, such proof was never filed and through all these years she has never contested respondent's claim. Moreover, section 38, chapter 2, title 30, U.S.C.A. (sec. 2332, U.S.R.S.) provides that where a person has held and worked a claim for a period equal to the time prescribed by the statute of limitations for mining claims of the state where the property is situated, evidence of such possession and working shall be sufficient to establish a right to a patent thereto in the absence of any adverse claim. The adverse claim referred to obviously means one arising during the period of time in question and before the prescribed time has elapsed. Under the circumstances here shown, the appellant was precluded from attacking the sufficiency of the origi-

nal location. Lind v. Baker, 31 Cal.App. 2d 631, 88 P.2d 777, and cases there cited.

[4] It is next contended that a finding that the appellant ousted and ejected respondent from the claims is unsupported. There is evidence that mining operations had been carried on on the property under some sort of leasing agreement which the respondent had made with a third party, that on the night of January 23, 1937, respondent and another man attempted to go upon the property, that they were met by an agent of the appellant who was armed with a gun and who threatened to kill them if they took another step forward, and that they retreated. Further comment is unnecessary.

[5] The next contention is that the appellant made a valid location on March 31, 1931. This fact was judicially determined against him in the previous action of Moodey v. Dale Consolidated Mines, supra. Moreover, the evidence in this case very conclusively shows that the property was then not open for location. Lind v. Baker, supra; McLean v. Ladewig, 2 Cal. App.2d 21, 37 P.2d 502; Dalton v. Clark, 129 Cal.App. 136, 18 P.2d 752.

[6, 7] It is next argued that a complaint alleging a cause of action was not filed within thirty days, as required by section 2326 of the Revised Statutes of the United States. A complaint in this action was filed within that time but the appellant demurred to it on the ground that it did not state that the respondent was a citizen of the United States. An amended complaint alleging such citizenship was filed but after the expiration of the thirty days in question. The appellant relies upon certain old cases, including Keppler v. Becker, 9 Ariz. 234, 80 P. 334, in which it was held that an amended complaint filed after the expiration of thirty days did not relate back to the time of filing the original complaint but was filed too late. The decision in that case was overruled in the case of Mitchell v. Vulture Min. & Mill Co., 47 Ariz. 249, 55 P.2d 636, 641, where the court said: "But to uphold the position that this amendment constitutes a new cause of action, instead of applying this rule, would take us back to the narrow, harsh construction of the term, cause of action, announced many years ago in the case of Keppler v. Becker, 9 Ariz. 234, 80 P. 334, but which was held erroneous and modified six years later in Boudreaux v. Tucson Gas etc. Co., 13 Ariz. 361, 114 P. 547, 552, 33 L.R.A.,N.S., 196." Amendments to pleadings are favored under our law except where an entirely different cause of action is attempted to be thus introduced and much is left to the sound discretion of the trial court. In Bryant v. Wellbanks, 88 Cal.App. 144, 263 P. 332, 334, in speaking of amendments which do not change the cause of action the court quotes from Doolittle v. McConnell, 178 Cal. 697, 174 P. 305: "Amendments of that character, so long as the identity of the matter upon which the action is founded is preserved, are admissible. * * * So long as the form of action is not changed, and the court can see that the identity of the cause of action is preserved, the particular allegations of the declaration may be changed, and others superadded, in order to cure imperfections and mistakes in the manner of stating the plaintiff's case." It clearly appears that the cause of action was in no way changed by the amendment in question, and the action was filed within the required time.

[8, 9] The next point is that the evidence does not show title in the respondent by adverse possession and that the finding to that effect is not legally sufficient. The evidence shows continued and uninterrupted possession of the plaintiff and his predecessors from 1922 until long after the appellant's purported relocation of the claim, and in fact up to 1937. There is even evidence that one or more agents of a tenant of respondent were upon the property at the very time the appellant claimed to have gone upon it and located the claim. The court found that the respondent and his predecessors had held and worked the claims in question for a period of more than five years continuously prior to the time of filing the complaint in this action, and had been in possession of said claims for five years continuously and for the requisite period of time to obtain title by adverse possession. The appellant contends that the finding omits to state that such possession was open and notorious. There was, however, an abundance of evidence to that effect. In Richert v. City of San Diego, 109 Cal.App. 548, 293 P. 673, 675, it is said: "The court's findings follow the language of the complaint, and find the ultimate fact of ownership in the plaintiff. This is sufficient, no finding of the several elements necessary to make the possession

adverse being necessary." It is further argued that the respondent relied upon proof of his chain of title, that the court not only found in his favor on that issue but also found that there had been an adverse possession, and that these findings are inconsistent. In H. & J. Mabury Co. v. Bryant, 9 Cal.2d 586, 71 P.2d 1111, 1113, the court said: "There is no inconsistency, as claimed by appellant, between the finding of good record title and the finding of good title by adverse possession. Taken together, these findings declare a complete interest in the property, whether deraigned from record title or from adverse possession, to be in plaintiff."

[10, 11] It is next contended that the judgment in the case of Moodey v. Dale Consolidated Mines, supra, is not a bar to the appellant's claim as found by the trial court. It was found, in that case, that this appellant's claim of location of this property was void as the property was not then open for location. Dale Consolidated Mines had by deed acquired the rights of Gross, and had also claimed a right by contract with the respondent here to have the foreclosure under the trust deed postponed. Its rights were ended by the action it brought against this respondent, among other defendants, and by the foreclosure sale under the trust deed. All of its interest passed to the respondent here, it was one of his predecessors although its right passed by foreclosure rather than by voluntary deed, and we think there was sufficient privity between the respondent and Dale Consolidated Mines to make applicable the usual rule that a judgment determining the existence of a particular fact is conclusive upon the parties or their privies whenever the existence of that fact again becomes an issue between them in the same or a different matter in the same or another court. Estate of Clark, 190 Cal. 354, 212 P. 622; Martin v. Holm, 197 Cal. 733, 242 P. 718. However, the point is not of much importance here as the evidence justifies the other findings which lead to the same result.

[12-14] It is next urged that the court erred in reserving its rulings upon objections to the admission into evidence of the findings of fact and judgment in the case of Moodey v. Dale Consolidated Mines, the judgment in the case between Dale Consolidated Mines and this respondent, Esther Wright and the trustee named in the trust deed and the trustee's deed after foreclosure. We do not understand the contention with respect to the two judgments, as the record shows that in both cases the objections were overruled and the judgments were admitted and the ruling was not reserved. A different situation appears with respect to the admission of the trustee's deed. In that regard it appears that an objection was made to the admission of this deed and a ruling was reserved. At the conclusion of the respondent's case counsel for appellant stated that he assumed that that reservation was still in force, that he did not waive his objections by failing to renew them at that time, that he did not waive his right to move for a nonsuit, and he suggested "that both the matters on the motions to strike the testimony and to strike the documentary evidence and the motion for a nonsuit are to be reserved for further consideration". The court acquiesced and opposing counsel agreed to the suggestions of the counsel for appellant that "if they are argued they will be deemed to have been argued at the conclusion of the plaintiff's case". The record shows that both parties rested on October 29, 1937, without anything further being done in this matter. Attached to the clerk's transcript, but not authenticated as a part of the record, appears a copy of a notice of motion to strike certain exhibits, including the trustee's deed, which notice was filed on November 22, 1937. It nowhere appears that such a motion was actually made or in any way called to the attention of the court.

It has been frequently observed that the practice of reserving rulings on the admission of evidence and closing the case without the rulings having been made is one not to be commended. In very few cases, however, has it been held that sufficient prejudicial error appeared to justify a reversal. In the instant case appellant's counsel, in effect, consented to the matter going over upon the understanding that if he desired to move for a nonsuit or to make a motion to strike, such motions would be considered to have been made as at the conclusion of the respondent's case. It does not appear that such motions were later made, and it is quite clear that all parties treated the documents as having been admitted in evidence. Moreover, in Clopton v. Clopton, 162 Cal. 27, 121 P. 720; the court in effect held that where the objections to the evidence should have been overruled no prejudice resulted. That rule should be applied here. Van Haaren v. Whitmore, 2 Cal.App.2d 632, 38 P.2d 829.

[15] The last point raised is that the court erred in admitting into evidence the trustee's deed to which we have referred, the findings and judgment in Moodey v. Dale Consolidated Mines, the deed from Esther Wright to this respondent, and the judgment roll in the case of Dale Consolidated Mines v. Hess and Wright et al. These documents were all material to respondent's chain of title and to the issues on trial, and they were properly admitted into evidence.

We find no reversible error in the record and the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

---

35 Cal.App.2d 368

PEOPLE v. MANDELL et al.

Cr. 1689.

District Court of Appeal, Third District, California.

Nov. 4, 1939.

Rehearing Denied Nov. 18, 1939.

Hearing Denied Dec. 4, 1939.

1. **Prostitution 🔑4**

Evidence sustained conviction of taking female person for the purpose of prostitution by means of fraudulent inducement. Pen.Code, § 266a.

2. **Criminal law 🔑742(1)**

Credibility of unwilling witness for the people was for jury.

3. **Prostitution 🔑1**

Where two accused were parties to plan to induce girl to follow practice of prostitution and both accused knew nature of house where girl was left for that purpose and participated in her profits, both accused became "principals" to crime of taking girl for purpose of prostitution by means of fraudulent inducement, even though one of the accused did not personally make a false statement to the girl to induce her to follow the practice of prostitution. Pen.Code, §§ 266a, 971.

[Ed. Note.—For other definitions of "Principal," see Words & Phrases.]

4. **Criminal law 🔑112(1)**

County to which girl was taken for purpose of submitting to prostitution had jurisdiction of prosecution for taking the girl for the purpose of prostitution by means of fraudulent inducement. Pen.Code, §§ 266a, 781.

5. **Criminal law 🔑112(1)**

When a female person is taken for prostitution purpose by means of false inducement, from one county into another county wherein the purpose is consummated, either of the counties has jurisdiction of the offense. Pen.Code, §§ 266a, 781.

6. **Indictment and Information 🔑110(51)**

Indictment which in language of statute charged that accused willfully and unlawfully and feloniously took a named female person for purpose of prostitution by procuring her consent by fraudulent inducements and misrepresentations, was sufficient to charge offense of taking female person for purpose of prostitution by means of fraudulent inducement, in absence of demurrer to the indictment. Pen.Code, §§ 266a, 950–952, 1012.

7. **Indictment and Information 🔑93**

Generally, an indictment need not allege the particular manner or means by which the offense charged is accomplished. Pen.Code, §§ 950–952.

8. **Indictment and Information 🔑109**

Where a statute contains several provisions, the violation of any one of which is an offense, the facts in indictment should be so stated as to render apparent which provision is relied on.

9. **Indictment and Information 🔑196(1)**

Accused who were charged with taking a female person for the purpose of prostitution by means of fraudulent inducement waived objection to insufficiency of indictment for failure to allege the particular means employed to secure the consent of the female, by failing to demur to the indictment. Pen.Code, §§ 266a, 950–952, 1012.

10. **Criminal law 🔑1038(3)**

Where instructions which were given regarding offense of taking female person for purpose of prostitution by means of fraudulent inducement, with which accused were charged, were not misleading, accused who failed to request more specific instruction could not complain for the first time on appeal of court's failure to charge that accused could not be found guilty if evidence merely proved that they took prosecuting witness for purpose of prostitution against her will. Pen.Code, § 266a.

11. Criminal law 🔑371(9)

In prosecution for taking female person for the purpose of prostitution by means of fraudulent inducement, evidence tending to show that an accused was engaged in business of pandering and had previously procured other women as inmates of another house of prostitution was admissible for purpose of showing guilty intent. Pen.Code, § 266a.

12. Criminal law 🔑1173(2)

In prosecution for taking female person for the purpose of prostitution by means of fraudulent inducement, refusal of instruction that evidence tending to show that an accused was engaged in business of pandering and previously had procured women as inmates of another house of prostitution should be limited to charge against such accused was not prejudicial under the evidence. Pen.Code, § 266a.

13. Criminal law 🔑1186(4)

In prosecution for taking female person for the purpose of prostitution by means of fraudulent inducement, any error in court's refusal to instruct jury that evidence tending to show that an accused was engaged in business of pandering and had previously procured several other women as inmates of another house of prostitution should be limited to charge against such accused, did not require reversal where there appeared to have been no miscarriage of justice in the case. Pen.Code, § 266a; Const. art. 6, § 4½.

Appeal from Superior Court, Sacramento County; Albert F. Ross, Judge.

Jimmie Mandell and Roy Hovermale were convicted of taking a female person for the purpose of prostitution by means of fraudulent inducement, and they appeal separately. The appeals were consolidated for hearing.

Affirmed.

W. C. Dorris and R. W. Henderson, both of Bakersfield, for appellant Mandell.

James F. Gaffney, of Sacramento, for appellant Hovermale.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The appellants were jointly indicted and convicted under section 266a of the Penal Code of the crime of taking a female person for the purpose of prostitution by means of fraudulent inducement. From the judgments of conviction which were accordingly rendered against them, separate appeals have been perfected. The appeals were consolidated for hearing.

It is contended the judgments are not supported by the evidence chiefly because of a lack of testimony that the consent of the female person was procured by fraudulent inducement, particularly with respect to the defendant, James Mandell; that the superior court of Sacramento county lacked jurisdiction for the reason that the inducement, if any, was made in Kern county and not in Sacramento county; that the indictment fails to state a cause of action since it does not allege the particular means by which the consent of the victim was procured, and that the court erred in giving to the jury certain challenged instructions and in refusing to limit evidence of other offenses of pandering to the defendant Hovermale.

[1] The judgments are adequately supported by the evidence. The defendant, Roy Hovermale, brought the prosecutrix, a minor, in his automobile from Oklahoma to Bakersfield, California, where they met the codefendant, Jimmie Mandell. The sordid story shows that the woman was induced to go with the defendants to Isleton by a promise to secure a position for her at that place as a waitress. She testified that "Roy called me and said he had a job for me in Isleton as a waitress". That statement was made in the presence and hearing of Mandell. She testified, "Q. Just tell what happened and who promised you (the job) and who was there. * * * A. Jimmie and Roy and I and Flash Wimmer. * * * We was sitting in Roy's brother's car." That night Miss Price took her suitcases and left Bakersfield for Isleton in company with the two defendants to secure the position for her as waitress. Instead of going directly to Isleton they first drove to Rio Vista where they ate breakfast the following morning. They then drove to Isleton. Jimmie did the driving. On the way to Isleton, in the presence of the three occupants of the car, Roy told her she "was going to work". When they arrived

at Isleton the car was parked near a building where a poolroom and a house of ill-fame were operated by Bill Bulehan, a Filipino. The house was called the Larena Rooms. Both defendants started to leave the machine, but Roy told Jimmie to remain in the car. Hovermale went in and arranged with the proprietor to take the girl into his apartments as an inmate to practice prostitution. After considerable conversation she was left at that place for two days during which she practiced prostitution, dividing the money which she received therefor equally with the proprietor of the house. He collected all of the money she earned. Her customers were chiefly Orientals. During that period of time both defendants demanded and received from Bulehan a portion of her earnings. The evidence leaves no doubt that both defendants knew she was left at that house for immoral purposes and both of them accepted proceeds from her earnings. While she was not engaged in her occupation she was locked in her room. While she was there she was kept under the observation of a guard. She said she was kept there as a captive.

Soon after arriving at Isleton she was taken into custody and the defendants were arrested on the charge for which they were subsequently indicted. The woman was an unwilling witness at the trial.

[2, 3] It is strenuously insisted by the defendant, James Mandell, that the evidence shows no false statement on his part to induce the girl to follow the practice of prostitution. It is true that she contradicted herself to some extent regarding his immediate presence when Hovermale told her he had a place for her in Isleton as a waitress. The jurors were the sole judges of the credibility of her story. She first said they sat in an automobile together when that statement was made. The jurors had a right to assume that her later modification of that statement was made in an effort to exonerate Mandell from that inducement. But it is immaterial whether Mandell actually told her personally that they were taking her to Isleton to install her in a position as a waitress. The defendants were companions. Both of them were parties to the plan to induce her to follow the practice of prostitution. Both of them knew the nature of the house where she was left for that purpose. Both of them participated in the profits of her practice. The elements of inducement and prostitution were intermingled and portions of a continuous offense in violation of section 266a of the Penal Code. As such, both of the defendants became principals in the crime. Sec. 971, Pen. Code. The evidence abundantly shows that both defendants are guilty of the crime with which they were charged.

[4, 5] The appellants assert that the superior court of Sacramento county lacked jurisdiction to try this case for the reason that the consent of the victim was procured in Kern county. There is no merit in this contention. The acts constituting the offense were continuing. The crime was consummated in Sacramento county. That is where she was persuaded to submit to prostitution. When a female person is taken for prostitution purpose by means of false inducement from one county into another county where the purpose is consummated, either of those counties has jurisdiction of the offense. Sec. 781, Pen.Code; People v. Grubb, 24 Cal.App. 604, 141 P. 1051; People v. De Martini, 25 Cal.App. 9, 142 P. 898; People v. Anderson, 3 Cal. App.2d 521, 40 P.2d 270.

[6] The indictment states a cause of action under section 266a of the Penal Code for taking a female person for the purpose of prostitution by procuring her consent by means of fraudulent inducement. It alleges that the defendants, "did then and there wilfully and unlawfully and feloniously take a female person, to-wit, * * * for the purpose of prostitution, by procuring the consent of said * * * by fraudulent inducements and misrepresentations."

Section 266a provides that:

> "Every person who, within this state, takes any female person against her will and without her consent, or with her consent procured by fraudulent inducement or misrepresentation, for the purpose of prostitution, is punishable," etc.

[7, 8] The offense may be committed in two ways, first, by taking a female person for prostitution purpose, against her will; secondly, by obtaining her consent by means of fraudulent inducement. The latter offense is clearly charged in the present case. The defendants failed to demur to the indictment. In the absence of a demurrer, the indictment charges the offense with sufficient particularity. Sec. 1012, Pen. Code. It is in the language of the statute. There is no question regarding the specific offense with which the defendants were

charged. The indictment conforms to the requirements of sections 950, 951 and 952 of the Penal Code. Usually it is not necessary that an indictment shall allege the particular manner or means by which the offense is accomplished. 31 C.J. 711, sec. 262. Where the statute contains several provisions, the violation of any one of which is an offense, the facts should be so stated as to render apparent which provision is relied on. 31 C.J. 703, § 254. In the present case it is clearly apparent from the indictment that the defendants were charged with procuring a female person to submit herself to prostitution by means of false inducements as distinguished from taking her by force and against her will. In the case of People v. Wright, 26 Cal. App.2d 197, 79 P.2d 102, 105, in which case a hearing was denied by the Supreme Court, an information merely charged the defendant with pandering under the statute of 1911 (Stats. 1911, p. 9; 1 Deering's Gen. Laws of 1931, p. 819, Act 1906), by alleging that he did "wilfully, unlawfully and feloniously procure for a female person * * * a place as an inmate of a house of prostitution". It was there held to be unnecessary to specify in the information the particular means which induced her to become an inmate of that house. In the present case the defendants were charged in the language of the statute with procuring the consent of the female by means of fraudulent inducement. The allegation of the particular means employed to secure her consent is important only to determine whether the alleged acts or statements were false. There is proof that the statement by means of which her consent was procured was false. The appellants waived their objection to the insufficiency of the allegation in that respect by failing to demur to the indictment.

The court did not err in failing to specifically charge the jury that the defendants could not be found guilty if the evidence merely proved that they took the prosecuting witness for the purpose of prostitution against her will. No such instruction was offered by the defendants.

[10] The instructions which were given regarding the offense which was charged are not misleading. If the defendants desired a more specific instruction in that regard they should have requested it. By their failure to do so they waived the right to complain of that omission for the first time on appeal. People v. Olsen, 80 Cal. 122, 128, 22 P. 125; 8 Cal.Jur. 309, § 362. In People v. Scofield, 203 Cal. 703, 265 P. 914, it was held to be error for the court to fail to instruct the jury on its own motion regarding distinct crimes which were alleged in separate counts under section 141 of the Vehicle Code, St.1923, p. 562. But in that case the defendant was specifically charged in separate counts of the information with different offenses which were directly involved in the case. It is apparent that evidence to support one of the charges might be insufficient to uphold others. That case has no application to the situation in the present case. In this case the court read to the jury section 266a of the Penal Code and read the indictment which clearly charges but one offense, which is the taking of the woman for the purpose of prostitution by means of fraudulent inducement. It does not state that she was taken against her will. The clear statement is that her consent was obtained by fraudulent inducement. That refutes the possibility of her having been taken against her will. The court then specifically charged the jury that the "plea puts in issue every material allegation of the information and charge, and it devolves upon the prosecution to establish beyond a reasonable doubt that they, the said defendants, are guilty of the crime charged against them in the information".

We are satisfied the jury could not have been misled by the instructions in that regard. The entire case was tried on the theory that the woman was taken, not against her will, but with her consent procured by fraudulent inducement.

[11] It is contended by the appellant Mandell that the court erred in refusing to instruct the jury that evidence which was adduced tending to show that Hovermale was engaged in the business of pandering and that he previously procured several other women as inmates of another house of prostitution, should be limited to the charge against Hovermale. A witness by the name of Ah Lee testified that within a year prior to the time of trial of this case the defendant, Hovermale, procured as inmates of Ah Lee's house of prostitution at Reedley four other women. The witness specifically testified that the defendant, Mandell, had nothing to do with those transactions. He repeatedly said he had never seen Mandell until the time of the

trial. This evidence was offered to show the motive or purpose of Hovermale in procuring the girl to become an inmate of the Larena Rooms at Isleton. In the case of People v. Grubb, 24 Cal.App. 604, 609, 141 P. 1051, 1053, in which a hearing was denied by the Supreme Court, it was definitely held that evidence of prior efforts by the defendant to procure other women to become inmates of similar houses of prostitution was competent "for the purpose of showing guilty intent". It is true that the charge in that case was pandering. But the charge in the present case involves the elements included in pandering. On the authority of the last-cited case, we are of the opinion the testimony was properly received in evidence. Moreover, the defendant Hovermale has filed no brief on appeal. His appeal was submitted on the briefs of counsel for Mandell, who does not contend the evidence is not competent as against Hovermale.

[12, 13] Assuming that the court should have instructed the jury, as requested, that the evidence of that previous conduct of Hovermale did not apply to the defendant Mandell, the refusal to do so was not prejudicial. There is no evidence that the defendants were formerly associates, or that they were even acquainted until just prior to April, 1939, when they were charged with this offense. The jury could not reasonably assume that Hovermale's previous practice of pandering involved the defendant, Mandell. Moreover, there appears to have been no miscarriage of justice in this case, and the error complained of is therefore cured under the provisions of article VI, section 4½, of the Constitution of California.

The judgments and the orders are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

14 Cal.2d 592

STORY v. CHRISTIN et al.

L. A. 17199.

Supreme Court of California.

Nov. 10, 1939.

Rehearing Denied Dec. 8, 1939.

1. Property 🔑4

Under common law, whatever was attached to land in any manner, including plants and trees growing in soil, as well as buildings and other products of man's labor, was part of land.

2. Landlord and tenant 🔑139(2)

Life estates 🔑14

A tenant at will or for life or any possessor of uncertain estate in land has right to go on land after termination of his estate and reap annual crops planted by him before such termination, including fruit grown on trees.

3. Evidence 🔑20(1)

It is matter of common knowledge that in nursery business young trees often remain in soil for much longer than one year.

4. Crops 🔑1

Trees attached to soil by roots in order to keep them ready for sale and transplantation are not profit of land in same sense as annual crop, matured from seed planted in ground and harvested within year, and do not constitute "crop" within legal meaning of such term.

The word "nursery," as used in respect to horticulture, has been held to mean a place where young trees are propagated for purpose of being transplanted.

[Ed. Note.—For other definitions of "Crop" and "Nursery," see Words & Phrases.]

5. Property 🔑2

A "stock in trade" is "stock of merchandise," which term, as ordinarily used among business men, includes goods or chattels held by merchant for sale and means visible and tangible property with which owner's trade or business is carried on and to which it relates.

[Ed. Note.—For other definitions of "Stock in Trade" and "Stock of Merchandise," see Words & Phrases.]

6. Property 🔑4

Nursery stock should be classified as "personal property," unless parties to action for conversion thereof intended as between themselves that such stock should be part of realty.

[Ed. Note.—For other definitions of "Personal Property," see Words & Phrases.]

7. Trover and conversion 🔑32(1)

A complaint, alleging that plaintiff placed nursery stock on land purchased by him solely for purpose of removal and sale and that defendants prevented him from removing such stock and converted it to their own use after re-entering on land because of plaintiff's failure to pay interest on contract price and taxes, as required by sale contract, stated cause of action for conversion of "stock in trade."

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Charles W. Story against Estelle Porter Christin and husband for conversion of nursery stock. From a judgment of dismissal, plaintiff appeals.

Reversed.

Superseding opinion, Cal.App., 89 P.2d 144.

Clyde C. Shoemaker, of Los Angeles (Winthrop O. Gordon, of Santa Ana, and William J. Currer, Jr., of Los Angeles, of counsel), for appellant.

Charles A. Christin, of San Francisco, and Guthrie & Darling, of Los Angeles, for respondents.

EDMONDS, Justice.

The appellant's action for the conversion of nursery stock was dismissed by the superior court upon the ground that the complaint does not state a cause of action, and the correctness of that ruling is the only question presented for consideration.

Some years ago, the appellant leased certain real estate owned by the respondents, using it to grow young orange and walnut trees. Later he contracted to purchase the land for an amount payable in instalments. This contract was replaced by one under which the appellant agreed to pay a larger amount for the land but was given three additional years to make the payments required. During the time these contracts were in effect, and in accordance with his rights under each of them, he was in possession of the property, using it to grow nursery stock for sale. Upon his failure to pay interest and taxes as he was required to do, the respondents successfully sued to cancel his contract (Christin v. Story, 119 Cal.App. 326, 6 P.2d 301), and they subsequently were placed in possession of the land under a writ of assistance. The appellant then brought the present action, alleging that after the respondents reentered upon the property, they prevented him from removing the nursery stock and converted it to their own use.

By his complaint the appellant alleged these facts: The nursery trees were planted by him while he was vendee in possession of the property. They were planted closely together in rows and in such close proximity to each other that it was impossible for them to remain in that position for more than a short period, and thereafter develop and become a part of a producing orange orchard or walnut grove. The vendors of the land knew of the buyer's intention to sell and remove these trees after a short period of time. At the time of their conversion by the respondents, many trees had been sold on future delivery, and the appellant at the time of the alleged conversion was endeavoring to sell the remainder of them. The respondents, and each of them, had full knowledge of these facts, including the sale of trees and contracts for future delivery, and all of the parties understood and intended that the nursery trees should not become permanently annexed to the real estate but should remain the personal property of appellant, to be sold by him for the purpose of planting in orchards.

The appellant also alleged that on or about the day he was put out of possession, and thereafter, he notified the respondents that they were wrongfully withholding and retaining possession of his nursery stock and demanded that they immediately deliver all of it to him, or permit him to remove it from the premises, but they refused to comply with his demand. According to the appellant's theory, as the parties intended that the trees planted by him should not become permanently affixed to the land, they were his personal property and constituted stock in trade for sale to the public in his nursery business. He also asserts that the complaint states a cause of action because facts are alleged which show the conversion of a growing crop wrongfully taken from his possession.

The respondents admit that the nursery trees were not fixtures, but they assert the right to them as a growing crop unsevered from the land at the time the appellant's right to possession was terminated by a judgment. Further stating their position, the respondents claim that a crop is a part of the soil in which it is growing, and only "by an express agreement or by an implied agreement created by estoppel, and not by any intention of the grower", may it be deemed personal property. Upon this point the appellant is charged with an asserted admission or stipulation made by his counsel when the sufficiency of the complaint was being considered, that the written contract for the purchase and sale of the land contains no provision allowing the buyer to remove nursery stock. Also, the respondents claim, the trial court properly took judicial notice of the prior action between the parties and the judgment rendered therein.

[1] The ancient law rigidly applied the maxim quicquid plantatur solo, solo cedit, and held that whatever was attached to the land in any manner whatsoever was a part of the land. (7 Holdsworth's History English Law, 284; 7 Id. 485.) This rule was applied to plants and trees growing in the soil and also to buildings and other product of man's labor. The tenant, therefore, had no right to remove anything placed upon or annexed to the land, for once annexed it became a part of the land and the landlord's property.

[2] Because of the injustice of the common law in this regard, an exception soon developed and a tenant at will or for life or any possessor of an uncertain estate was given the right to come upon the land and reap the crops which he had planted before the termination of his estate. However, only crops which were the natural profit of the soil to which the tenant had contributed by his labor might be taken. (Coke on Littleton, sec. 55b.) Thus only annual crops were included. This rule is followed in California but the word "crop" has been defined by this court as including fruit grown on trees, although the trees are not included in that term. Cottle v. Spitzer, 65 Cal. 456, 4 P. 435, 52 Am.Rep. 305.

[3, 4] Many years ago, it was held that in this state the word "nursery" as used in respect to horticulture, "is a place where young trees are propagated for the purpose of being transplanted * * *." (Atty. Gen. v. State Board Judges, 38 Cal. 291, 296.) It is a matter of common knowledge that in the nursery business the young

trees often remain in the soil for much longer than one year. There is no annual sowing and reaping. The purpose of planting them is that they may later be transplanted. Such trees are attached to the soil by roots because only in this manner may they be kept ready for sale. Of course, they grow and develop in the meantime, but they are not a profit of the land in the same sense as an annual crop matured from seed planted in the ground and harvested within the year and do not constitute a "crop" within the legal meaning of that term.

[5] On the other hand, such trees seem to have all the characteristics of stock in trade, which is a stock of merchandise as that term is ordinarily used among business men. This term includes the goods or chattels which a merchant holds for sale. Shasta Lumber Co. v. McCoy, 85 Cal.App. 468, 259 P. 965; Charles J. Off & Co. v. Morehead, 235 Ill. 40, 85 N.E. 264, 20 L.R.A.,N.S., 167, 126 Am.St.Rep. 189, 14 Ann.Cas. 434; Swift & Co. v. Tempelos, 178 N.C. 487, 101 S.E. 8, 7 A.L.R. 1581; It is "the visible and tangible property with which the trade or business of the owner is carried on, and to which it relates". New York Biscuit Co. v. Cambridge, 161 Mass. 326, 37 N.E. 438, 439. The term, of course, varies according to the business to which it is applied and includes articles which cover a very wide range. Nursery trees are attached to the land by their roots because, under the law of agriculture, they must get their nourishment from the land. The ground is the only feasible storage place for this salable product and soil serves the dual purpose of maturing and preserving until a buyer is found for them.

[6] The question here considered does not appear to have been decided before in this state, although the case of Asato v. Emirzian, 177 Cal. 493, 171 P. 90, refers to nursery stock as personal property. In Kirkman v. Sargent, 42 Cal.App. 290, 183 P. 591, the court said that a determination whether nursery stock is real or personal property turns upon the intention of the parties. As between the tenant nurseryman and a condemnor under eminent domain, the young trees were held to be an improvement of the real estate, although as between the grower and the lessor they were personal property. City of Los Angeles v. Hughes, 202 Cal. 731, 262 P. 737. These cases are not controlling under the facts of the present case but they indicate that nursery stock should be classified as personal property unless there is evidence that the parties, as between themselves, intended that they should be a part of the realty.

[7] Decisions in other states holding that under particular circumstances nursery stock is a part of the realty, are not authority for a determination of the rights of a dispossessed vendee under an executory contract of sale, who is suing his vendor upon the facts pleaded by the appellant in this case. These allegations show that he placed the nursery stock upon the land solely for the purpose of removal and sale, and state a cause of action for the conversion of a stock in trade.

The judgment is reversed.

We concur: CURTIS, J.; SHENK, J.; CARTER, J.; HOUSER, J.; KNIGHT, Justice pro tem.; SPENCE, Justice pro tem.

---

14 Cal.2d 605

ROTEA v. IZUEL.

L. A. 16282.

Supreme Court of California.

Nov. 15, 1939.

Rehearing Denied Dec. 14, 1939.

1. Frauds, statute of 🔑50(2), 54½, 138(4)

An alleged oral contract entered into between plaintiff and decedent to compensate plaintiff for care furnished by plaintiff to decedent's invalid sister out of proceeds of decedent's estate was invalid under statute of frauds and plaintiff's cause of action, if any, against decedent's executor for care furnished by plaintiff to decedent's sister was for reasonable value of services performed. Civ.Code, § 1624, subd. 7; Code Civ.Proc. § 1973, subd. 6.

2. Executors and administrators 🔑205(1)

Where services performed by plaintiff in caring for decedent's invalid sister were admittedly performed for direct benefit of sister rather than for benefit of decedent or for benefit of any person as to whom decedent owed a legal duty of support, plaintiff could not recover from decedent's estate for value of services under an alleged oral contract with decedent or upon an obligation implied in law. Civ.Code, § 1624, subd. 7; Code Civ.Proc. § 1973, subd. 6.

3. Work and labor ⚷4(3)

Where one person requests another to perform services for a third person, as to whom the first person owes no legal duty of support, any right of recovery against the first person for the services must be based upon a valid agreement of the first person to pay for the services, since the law will not imply an obligation on the part of the first person to pay for such services.

4. Contracts ⚷4

In absence of a valid agreement between parties, the law will not imply an obligation by a defendant unless failure to imply such obligation will result in defendant's unjust enrichment.

5. Trial ⚷404(1)

In action against decedent's executor for alleged reasonable value of services rendered to decedent's invalid sister, findings were to be read in light of evidence and admitted facts.

6. Executors and administrators ⚷205(1)

Incidental benefit which decedent may have found in the satisfaction of obtaining compliance with his oral request that plaintiff care for decedent's invalid sister, as to whom decedent did not owe a legal duty of support, was insufficient to create an obligation, implied in law, by decedent to reimburse plaintiff for services rendered to decedent's sister.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Ireneo Rotea against Pablo Izuel, as executor of the last will and testament of Antonio Izuel, deceased, for the alleged reasonable value of services rendered to deceased's sister, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Reversed.

For prior opinion, see 89 P.2d 405.

Fall & Fall and W. B. Bobbitt, all of Los Angeles (Earle M. Daniels and Allen O. Cooper, both of Los Angeles, of counsel), for appellant.

Allan J. Carter and Walter Y. Stedman, both of Pomona, amici curiae for Rebecca J. Ramage's estate.

Kirtland I. Perky, James E. Fenton, and Frank G. Howe, all of Los Angeles, for respondent.

SPENCE, Justice pro tem.

Plaintiff brought this action against the defendant executor of the last will and testament of Antonio Izuel, deceased, seeking to recover upon a rejected claim for the alleged reasonable value of services rendered to Eugenia Izuel, the sister of said Antonio Izuel, deceased. Plaintiff had judgment for the sum of $9,000 and from said judgment, defendant appeals.

There was but little conflict in the evidence and a brief summary of the facts will suffice. One of the sisters of the deceased, who had married plaintiff, died many years ago leaving five minor children as the issue of said marriage. At about the time of the death of plaintiff's wife, another sister of said deceased, namely Eugenia Izuel, moved into the home of plaintiff to live with the family and to assist in caring for said minor children. She had previously stayed at said home of plaintiff, for months at a time, during the illness of plaintiff's wife. In 1916 and while so living in plaintiff's home, said Eugenia Izuel became ill, was operated upon and thereafter was a semi-invalid for the remainder of her life. She nevertheless was not helpless and she did many things for herself and she instructed and advised said minor children. She died in 1932. Antonio Izuel died in 1935. The claim here involved was made by plaintiff against the estate of Antonio Izuel, deceased, for services performed in furnishing room, board and nursing care to said Eugenia Izuel from 1916 until the time of her death in 1932.

Antonio Izuel, deceased, was unmarried and he also lived in plaintiff's home during a portion of said period. Plaintiff absented himself from his said home for more than a year during said period while on a trip to Mexico. At about the time of the death of Eugenia Izuel, said Antonio Izuel, deceased, built a home for himself and thereafter plaintiff and his family moved into and lived in the home of said Antonio Izuel, deceased. As the testimony of said Antonio Izuel could not be had by reason of his death and as the testimony of plaintiff was barred by the provisions of section 1880 of the Code of Civil Procedure, the only evidence offered concerning any agreement or understanding between said parties was rather indefinite and unsatisfactory. It appears that both plaintiff and the deceased, as well as the children of the plaintiff, had performed services for said Eugenia Izuel during the years in question; that both plaintiff and the deceased had purchased food used by the family group; that the deceased had paid the hospital and doctors' bills of said Eugenia Izuel; that deceased had given money to plaintiff on many occasions and had also given plaintiff seventeen checks which checks totaled approximately $1,350. The testimony upon which plaintiff mainly relied was the testimony of certain children of plaintiff. This testimony related to conversations had between plaintiff and the deceased at various times during the 16-year period in which it was claimed that the deceased "promised to pay my father out of his estate for Eugenia's care" or as otherwise stated deceased said that the payment "for the services rendered to Eugenia would be at the time of his death whatever was left in his estate". Timely objection was made to this testimony but it was admitted subject to a motion to strike. The motion to strike was thereafter made as well as a motion for nonsuit, but both motions were denied.

[1] It appears appropriate to state the substance of the pleadings and the findings. Preliminarily it may be said that it is apparently conceded that plaintiff could not recover upon the claimed oral agreement as said oral agreement was invalid under the statute of frauds and that plaintiff's cause of action, if any, was one for the reasonable value of the services performed. Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A.1915E, 562; Trout v. Ogilvie, 41 Cal.App. 167, 182 P. 333; Giles v. Reed, 44 Cal.App. 367, 186 P. 614; Civ.Code, § 1624, subd. 7; Code Civ.Proc. § 1973, subd. 6. Plaintiff therefore did not directly allege the claimed oral agreement, but he did indirectly allege said oral agreement, presumably for the purpose of endeavoring to fasten liability upon the deceased for the services rendered to the sister and for the purpose of endeavoring to avoid the consequences of the application of the statute of limitations. The complaint was in the general nature of a common count but the exact nature of the allegations becomes important in the discussion which follows.

Plaintiff alleged that he furnished room, board and nursing care for said Eugenia Izuel for said period of approximately 16 years "at the special instance and request of said Antonio Izuel" and that the reasonable value of said services was $10,575. He further alleged, "That all of said services were rendered by said plaintiff to said Antonio Izuel as aforesaid, during all of said time, with the expectation on the part of said plaintiff, that he would be paid and that he should receive, and with the expectation and intention, on the part of said Antonio Izuel, that said plaintiff should be paid and that he should receive, reasonable compensation therefor, out of the estate of said Antonio Izuel, after his death". He further alleged, "That all of said services were rendered by said plaintiff to said Antonio Izuel, continuously during all of said time, pursuant to the instance and request of said Antonio Izuel, as aforesaid, and pursuant to the said mutual expectations of said plaintiff and said Antonio Izuel, and with the knowledge and approval of the said Antonio Izuel, and he accepted said services, and the benefits derived therefrom." The findings followed closely the wording of the complaint except that the amount awarded was slightly less than that alleged.

It is difficult to determine from the complaint whether plaintiff was basing his claim against the deceased upon an alleged obligation implied in law, to-wit: upon a quasicontractual obligation, or upon an alleged obligation arising out of an agreement of the parties, to-wit: upon a genuine contractual obligation. The pleading was no doubt drawn in the light of several decisions in each of which the claimant sought recovery against the estate of the deceased for services rendered by the claimant with respect to the deceased personally over a long period of time. Mayborne v. Citizens' Trust & Savings Bank, 46 Cal.App. 178, 188 P. 1034; Warder v. Hutchison, 69 Cal.App. 291, 231 P. 563; Robinson v. Chapman, 98 Cal.App. 278, 276 P. 1081; American-La France Fire Engine Co. v. Bagge, 98 Cal.App. 291, 276 P. 1066; Lauritsen v. Goldsmith, 99 Cal. App. 671, 279 P. 168; Colwell v. Gardner, 126 Cal.App. 403, 14 P.2d 825; Burr v. Floyd, 137 Cal.App. 692, 31 P.2d 402; Manford v. Coats, 6 Cal.App.2d 743, 45 P. 2d 395; Seib v. Mitchell, 10 Cal.App.2d 91, 50 P.2d 281; Wax v. Adair, 16 Cal.App. 2d 393, 60 P.2d 904; Turell v. Anderson, 16 Cal.App.2d 445, 60 P.2d 906. What is said in Lauritsen v. Goldsmith, supra, regarding the claim filed therein will demonstrate that plaintiff here was endeavoring "to steer a middle course" in order to avoid the consequences of the application of the statute of frauds and of the statute of limitations. It was there said 99 Cal.App. at page 674, 279 P. at page 169, "Apparently the claim filed in the instant case avoided the consequences of relying on the ordinary contract implied by law as was done in the Etchas v. Orena Case [127 Cal. 588, 60 P. 45], and at the same time avoided relying entirely upon the express promise to compensate by will, as did the claim in Giles v. Reed. The claim here is evidently framed to steer a middle course between these two cases and follows closely the language of the findings of Mayborne v. Citizens' T. & S. Bank, 46 Cal.App. 178, at page 181, 188 P. 1034."

Plaintiff relies upon the decisions above mentioned but we find none of them in point. In none of said cases was the invalid oral agreement admitted, over objection, for the purpose of imposing the original obligation which the invalid oral agreement purported to create. In each of said cases the services were performed with respect to and for the direct benefit of the deceased person and under such circumstances as to create an original obligation implied in law to pay the reasonable value of such services, which obligation arose independently of the terms of the invalid oral agreement. Recovery was therefore permitted upon such obligation implied in law rather than upon the invalid oral agreement. The most that can be said is that the use of the invalid oral agreement was permitted, over objection, for the limited purpose of showing that it was intended by the parties that some compensation should be paid for such services and that the time for payment should be a future time rather than monthly (Labor Code, § 3002, St. 1937, p. 262; formerly Civ.Code, § 2011), thereby preventing the running of the statute of limitations until such time had arrived. The soundness of the abovementioned decisions has been questioned but it appears unnecessary to review said decisions here. It is only necessary to hold that the rule of said decisions may not be extended to permit a recovery in the instant case for the reasons hereinafter stated.

[2] The services here were admittedly performed with respect to and for the direct benefit of Eugenia Izuel, the sister of the deceased. In other words, said services were not performed with respect to or for the direct benefit of the deceased or with respect to or for the direct benefit of any person as to whom the deceased owed a legal duty of support. Defendant therefore contends that plaintiff may not recover against the estate of the deceased upon the invalid oral agreement for the reasons hereinabove stated and that he may not recover upon an obligation implied in law as the law will not imply an obligation from the mere fact that the deceased may have requested plaintiff to perform services for a third person. In our opinion this contention must be sustained.

[3, 4] It appears to be well settled in this jurisdiction that where one person requests another to perform services for a third person, as to whom the first person owes no legal duty of support, any right of recovery against the first person must be based upon a valid agreement of the first person to pay for such services as the law will not imply an obligation on the part of such first person to pay for such services. McClenahan v. Keyes, 188 Cal. 574, 206 P. 454; McClenahan v. Keyes, 65 Cal.App. 467, 224 P. 241; Zumwalt v. Schwarz, 112 Cal.App. 734, 297 P. 608. The same rule was enunciated in Bristol v. Sutton, 115 Mich. 365, 73 N.W. 424, where the agreement to pay for the services was invalid under the statute of frauds. The reason for the rule seems to be that the parties should ordinarily be required to rely upon their agreement and that in the absence of a valid agreement between the parties, the law will not imply an obligation unless the failure to imply such obligation will result in the unjust enrichment of the defendant. This is illustrated by certain decisions involving actions for money had and received. As was said in Pollak v. Staunton, 210 Cal. 656, at page 665, 293 P. 26, at page 30, "The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment. The measure of the liability is the amount received." Recovery is denied in such cases unless the defendant himself has actually received the money. Whittier v. Home Savings Bank, 161 Cal. 311, 119 P. 92; Papeschi v. La Cava, 93 Cal.App. 209, 269 P. 731.

In some of the authorities, it is said that the obligation will be implied in law where the defendant has "received the benefit". Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146; Woodward, Quasi-Contracts, § 104; Keener, Quasi-Contracts, p. 278-279. Thus in Long v. Rumsey, supra, this court said, 12 Cal.2d at page 344, 84 P.2d at page 150, "The only promise implied by law is a promise to pay based upon the equitable doctrine that the promisor, having received the benefit, should pay its reasonable value." In that case the services were performed with respect to and for the direct benefit of the deceased himself and the language of said decision should not be construed to mean that an obligation will be implied in law where the direct benefit is received by a third party and the only benefit received by the defendant is the incidental benefit which he may find in the satisfaction of obtaining compliance with his request. See, Gazzam v. Simpson, 2 Cir., 114 F. 71; Henrikson v. Henrikson, 143 Wis. 314, 127 N.W. 962, 33 L.R.A., N.S., 534; Kimmins v. Oldham, 27 W. Va. 258; Vanderhoef v. Parker Bros. Co., 267 Mich. 672, 255 N.W. 449. The authorities on the subject are reviewed in an article in 44 Harvard Law Review, page 623, where it is said at page 624, "Where the part performance of a contract within the statute of frauds consists of property or services furnished to a third person, the courts generally do recognize the principle that recovery is dependent upon the defendant's enrichment and deny quasi-contractual recovery."

[5, 6] We are not unmindful of plaintiff's claim that the above-mentioned authorities are inapplicable as the trial court found that the services furnished to Eugenia Izuel "were rendered by said plaintiff to said Antonio Izuel" and that said Antonio Izuel accepted "the benefits derived therefrom". These findings, however, must be read in the light of the evidence and of the admitted facts. Only in the sense that said services were rendered at the request of Antonio Izuel, may it be said that they were rendered "to said Antonio Izuel" or that said Antonio Izuel accepted "the benefits derived therefrom". The only benefit which could be referred to in the findings was the incidental benefit which said Antonio Izuel may have found in the satisfaction of obtaining compliance with his request and such incidental benefit was insufficient to create an obligation implied in law under the authorities last cited.

The judgment is reversed.

We concur: SHENK, J.; CURTIS, J.; HOUSER, J.; EDMONDS, J.; KNIGHT, Justice pro tem.

---

14 Cal.2d 591

COAN v. SUPERIOR COURT IN AND FOR SAN BERNARDINO COUNTY et al.

S. F. 16329.

Supreme Court of California.

Nov. 9, 1939.

Certiorari 🔑5(1)

An order granting a motion to vacate a judgment for lack of jurisdiction of the person was appealable as a "special order" after final judgment, and hence a petition to review the order was required to be denied, since certiorari will not lie to review an appealable order or judgment before or after the expiration of the time limited by law for appealing therefrom.

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

◆

In Bank.

Petition by Ernest G. Coan against the Superior Court of the state of California, in and for the County of San Bernardino, and others to review an order of the Superior Court granting a motion to vacate a judgment.

Petition denied.

Hales & Hales, of Redlands, for petitioner.

PER CURIAM.

This is a petition to review an order of the Superior Court granting a motion to vacate a judgment for lack of jurisdiction of the person. The petition must be denied for the reason that the order is appealable as a special order after final judgment (Colby v. Pierce, 15 Cal.App.2d 723, 59 P.2d 1046; Casner v. Superior Court, 23

Cal.App.2d 730, 74 P.2d 298; Harth v. Ten Eyck, 12 Cal.2d 709, 87 P.2d 693), and it is the general rule that certiorari will not lie to review an appealable order or judgment either before or after the expiration of the time limited by law for appealing therefrom. State Board of Equalization v. Superior Court, 9 Cal.2d 252, 70 P.2d 482; Casner v. Superior Court, supra. The case of Zierath v. Superior Court, 35 Cal.App. 788, 171 P. 112, in which case such an order was annulled on certiorari, failed to consider this objection, and must be disapproved.

14 Cal.2d 602

In re McALLISTER.

Cr. 4246.

Supreme Court of California.

Nov. 14, 1939.

1. Attorney and client 🔑39

Under the statute authorizing disbarment of an attorney on his conviction of a crime involving moral turpitude, conviction of an attorney for conspiracy to violate statute prohibiting sale of cemetery lots which are falsely represented to be under perpetual care was a conviction of a "crime involving moral turpitude" and justified attorney's disbarment. Code Civ.Proc. §§ 287, subd. 1, 288; Pen.Code, § 182; St.1931, p. 2443, § 17.

[Ed. Note.—For other definitions of "Crime Involving Moral Turpitude," see Words & Phrases.]

2. Attorney and client 🔑39

Under the statute authorizing an attorney's disbarment on his conviction of a crime involving moral turpitude, "moral turpitude" is everything done contrary to justice, honesty, modesty, or good morals. Code Civ. Proc. § 287, subd. 1; § 288.

[Ed. Note.—For other definitions of "Moral Turpitude," see Words & Phrases.]

3. Attorney and client 🔑39

Under the statute authorizing an attorney's disbarment on his conviction of a crime involving moral turpitude, if actual commission of an offense involves moral turpitude, then a conspiracy to commit such offense would involve "moral turpitude." Code Civ.Proc. § 287, subd. 1; § 288.

4. Attorney and client 🔑39

Under statute authorizing an attorney's disbarment on his conviction of a crime involving moral turpitude, penalty of disbarment or suspension applies to conviction of a misdemeanor involving moral turpitude as well as a felony of same character. Code Civ.Proc. § 287, subd. 1; § 288.

5. Attorney and client 🔑39

Where conviction of attorney for conspiracy to sell cemetery lots which were falsely represented to be under perpetual care was a conviction of a crime involving moral turpitude within the statute authorizing an attorney's disbarment for such an offense, a statement of trial judge that he was imposing a fine rather than a prison sentence because he did not believe that attorney's license should be forfeited and that he was treating case as a misdemeanor could not in any way change character of crime of which attorney was adjudged guilty or justify refusal to disbar attorney. Code Civ. Proc. § 287, subd. 1; § 288; St.1931, p. 2443, § 17.

6. Attorney and client 🔑39

A trial judge had no authority to make an alleged finding, after attorney's conviction of conspiracy to sell cemetery lots which were falsely represented to be under perpetual care, that such crime was not a crime involving moral turpitude within statute authorizing disbarment for conviction of such an offense, since question of nature of crime was one of law to be determined by Supreme Court. Code Civ.Proc. § 287, subd. 1; § 288; St.1931, p. 2443, § 17.

7. Attorney and client 🔑54

In proceeding to disbar an attorney because of his conviction of a crime involving moral turpitude, Supreme Court is limited to consideration of record of conviction as certified to it by clerk of trial court. Code Civ.Proc. § 287, subd. 1; § 288.

In Bank.

Proceeding in the matter of the disbarment of H. L. McAllister, an attorney and counselor at law.

Respondent disbarred.

Klein & Clarke, of San Francisco, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent State Bar of California.

CURTIS, Justice.

Upon the filing in this court by the clerk of the superior court of the county of Alameda, in pursuance of section 288 of the Code of Civil Procedure, of a certified copy of the record of conviction of H. L. McAllister, the petitioner herein, of the crime of conspiracy to violate section 17 of the General Cemetery Act (Stats.1931, p. 2434, as amended; Deering's General Laws, Act 1288), this court entered an order removing petitioner from his office as an attorney and counselor at law, it appearing to this court at the time of the entry of said order that the judgment of conviction had become final. Upon his petition, a rehearing of said matter was granted petitioner and the same is now before this court for decision.

The sole question for our consideration is whether the petitioner was convicted of a crime involving moral turpitude.

Section 17 of the General Cemetery Act provides that: "Every person * * * who shall sell, offer for sale or advertise any cemetery plot under representation that such plot is under perpetual care, before a perpetual care fund has been established for the cemetery in which such property so sold, offered for sale or advertised is situated, shall be guilty of a misdemeanor."

[1] Undoubtedly the violation of this section of said act would involve dishonesty if not fraud. To sell lots in a cemetery representing that they are under perpetual care when no provision had been established for such perpetual care would be a false representation and make the seller thereof liable in a civil action, and under said statute, render him subject to criminal prosecution. A conviction under said statute would manifestly be a conviction of a crime involving moral turpitude. In re Finch, 156 Wash. 609, 287 P. 677; In re Comyns, 132 Wash. 391, 232 P. 269.

[2, 3] Moral turpitude is defined as "everything done contrary to justice, honesty, modesty, or good morals". Matter of Coffey, 123 Cal. 522, 524, 56 P. 448, 449; Lantz v. State Bar, 212 Cal. 213, 218, 298 P. 497; Jacobs v. State Bar, 219 Cal. 59, 64, 25 P.2d 401. If the actual commission of an offense involves moral turpitude, then a conspiracy to commit such offense would involve moral turpitude. In re O'Connell, 184 Cal. 584, 194 P. 1010; In re O'Connell, 199 Cal. 538, 250 P. 390, 48 A.L.R. 1232; In re Shepard, 35 Cal.App. 492, 170 P. 442.

Petitioner seeks to avoid the effect of said judgment by reason of a statement made by the trial judge immediately after pronouncing judgment against him. This statement was as follows: "The imposition of a fine rather than any county jail or state prison sentence was imposed for the reason that I do not believe that the defendant's license to practice law should be forfeited by reason of his conviction, and I have therefore treated the case as a misdemeanor. The crime of which the defendant has been convicted upon the eighth count is not, in my opinion, involving moral turpitude."

[4, 5] We cannot see that this statement of the trial judge could in any way change the character of the crime of which petitioner was adjudged guilty. The trial court by imposing a fine against the petitioner instead of committing him to the state prison made the offense of which he was found guilty a misdemeanor instead of a felony, but the penalty of disbarment or suspension of an attorney applies to the conviction of a misdemeanor involving moral turpitude as well as to a felony of the same character. Subd. 1, sec. 287, Code Civ.Proc. It might be well to state here that under section 182 of the Penal Code, the court was authorized after petitioner's conviction to sentence him to serve a term of imprisonment in a state penitentiary or county jail, or order that he pay a fine, or both.

Petitioner contends that this statement of the trial court was in effect a finding of the trial court that he was not guilty of an offense involving moral turpitude. But the trial court had no authority to make such a "finding", if we can use that term in referring to this statement, as the jury had already found to the contrary.

[6] Whether petitioner was convicted of a crime involving moral turpitude or of one not involving moral turpitude was a question of law and not one of fact, and the prerogative to decide that question of law is with this court, upon the transmission to this court of the certified copy of the record of conviction by the clerk of the trial court, and not with the trial court.

[7] In acting in this matter, this court is limited to the consideration of the rec-

ord of conviction as certified to us by the clerk of the trial court, as section 287 of the Code of Civil Procedure makes said record conclusive evidence of petitioner's conviction. As this record conclusively shows that petitioner was convicted of an offense involving moral turpitude, and that the judgment of conviction is now final, we have no alternative but to invoke and apply the law as in such cases made and provided.

It is, therefore, hereby ordered that said H. L. McAllister, be removed from his office as an attorney and counselor at law, and that he be precluded from acting as an attorney or agent of another, in and before all the courts, commissions, and tribunals of this state, and from holding himself out to the public as an attorney or counselor at law.

We concur: WASTE, C. J.; SHENK, J.; HOUSER, J.; EDMONDS, J.; GIBSON, J.; CARTER, J.

---

14 Cal.2d 597

CANE v. STATE BAR OF CALIFORNIA (two cases).

S. F. 16189, No. 16297.

Supreme Court of California.

Nov. 13, 1939.

As Modified Dec. 11, 1939.

1. Attorney and client ⚿53(2)

In disbarment proceedings, evidence supported finding that attorney, after having collected an award by Industrial Accident Commission for client, obtained client's agreement to permit attorney to retain a substantial part of award as a loan by falsely representing to client that fee awarded attorney was insufficient and that if client did not make loan attorney would sue him for 50 per cent. of award and recover such amount.

2. Attorney and client ⚿44(2)

The disbarment of an attorney for violation of rules of professional conduct was warranted, where attorney had accepted and retained money given to him by clients for performing services which were never performed and failed to account for money received in guardianship and estate proceedings, especially where evidence supported finding that attorney was not subject to a claimed mental disability when transgressions occurred.

3. Attorney and client ⚿44(2)

As respects disbarment, neither necessity nor misfortune is a defense to an attorney who uses money of his clients.

In Bank.

Separate proceedings by Archibald Cane against the State Bar of California to review two recommendations of the Board of Governors of the State Bar of California that petitioner be disbarred from practicing law.

Petitioner ordered disbarred.

Archibald Cane, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

By separate proceedings, the petitioner seeks to review two recommendations of the board of governors of the State Bar of California that he be disbarred from practicing law in this state. The first recommendation is the result of disciplinary proceedings instituted against the petitioner in April, 1937. In the latter part of June of that year, petitioner was adjudged insane and committed to a state hospital. Later, pursuant to the rules of procedure of the State Bar, this court entered an order suspending him from practice and staying the proceedings with reference to the Board's recommendation until the further order of the court.

In June, 1938, the petitioner was discharged from the hospital upon the ground that he had recovered and in October of that year the stay of disciplinary proceedings was terminated. Thereafter, he filed in this court the application numbered S. F. 16189 to review the recommendations of the board of governors. In September, 1938, the State Bar instituted further disciplinary proceedings against the petitioner relating to additional transactions that had occurred prior to the time of his commitment to the asylum. This resulted in a second recommendation of disbarment by the board of governors which is now before the court for review in the proceeding numbered S. F. 16297.

The facts upon which the board of governor's recommendations are based are largely undisputed. On October 15, 1929, petitioner, who is now 34 years of age, after examination was admitted to practice law in this state. For several years he was employed on a salary basis by the San Francisco Legal Aid Society. In so far as the record shows, his difficulties began early in 1935 when he commenced misappropriating the funds of his clients. For one of these occurrences he was suspended from practice for a period of 30 days upon the recommendation of the board of governors.

The transaction for which the board first recommended disbarment arose out of a divorce action in which the petitioner had been employed as attorney for the wife. In December, 1935, the wife, who was then in Switzerland, wrote petitioner asking him to collect and forward the money due her under the divorce decree. In June and July of 1936, the petitioner collected a total of $298 from the husband, who requested petitioner to hold it until he could make a further payment so that the entire sum could be sent at one time. However, the husband sent the next payment direct to his wife in Switzerland and then learned some six months later that no part of the $298 had been forwarded to the wife. Petitioner claims that he was entitled to deduct a fee for his collection services from these funds but admits that he never communicated with the wife after receiving the money. During a period of several months, the Swiss Consul at San Francisco unsuccessfully endeavored to obtain the money from the petitioner, and the client's claim was finally settled, after charges had been filed with the State Bar, upon the payment of $200.

The second disciplinary proceeding relates to the affairs of some eight clients. It appears that the petitioner accepted $90 from two persons as a fee and costs to qualify them as business partners under a fictitious name. He failed to perform these services, co-mingled the money with his own and retained it for his own use and purposes. Another client employed him to bring an action to annul her marriage and paid him $40 toward fees and costs. He failed to take any action for her other than to file a complaint and retained this money also. The petitioner was also employed by three other clients to institute divorce suits in their behalf and was paid a total of $110 on account of costs and fees. In each case he failed to take any action whatsoever but used the money for his own needs.

The record also shows that the petitioner was employed in a certain guardianship proceeding in connection with which his client paid him $135. Of this he claimed $50 on account of fees and spent $53 for costs, leaving $32 unaccounted for. He also received $600.52 from the sale of certain property involved in these proceedings, and of this sum he admittedly appropriated all except $80. Also, during this period he received and failed to account for $400.19 which he had received as special administrator of the estate of a deceased person. This defalcation was later made good by the surety on the petitioner's bond, to whom he is still indebted for the amount paid.

[1] In November, 1936, the petitioner obtained an award by the Industrial Accident Commission in behalf of another client in the sum of $608.61 including an allowance of $65 on account of attorney's fee. Pursuant to a written authority from his client, he collected the amount of the award and retained almost $500 of it as a loan from the client. This loan was purportedly made in consideration of the petitioner's agreement to waive the fee awarded him. However, the local investigating committee and the board of governors found that this agreement was obtained upon petitioner's false representation to the client that the fee awarded him was insufficient and that if the client did not make the loan, petitioner would sue him in the civil courts for 50 per cent of the award and would doubtless recover that amount. Although petitioner denied making any such representation, the testimony of the client substantially supports the findings.

Another instance of misappropriating client's funds, which occurred in 1937, was not included in the State Bar's charges against petitioner but resulted in an indictment against him for grand theft. He stood trial upon this charge after his release from the asylum and was found guilty but was acquitted upon a hearing of the further plea of "not guilty by reason of insanity". A transcript of that hearing, containing testimony concerning petitioner's mental condition given by two psychiatrists appointed by the court, was received in evidence in the disciplinary proceedings.

[2] It is evident that the facts proved against petitioner show a clear violation of the rules of professional conduct and,

standing alone, would fully justify the conclusion of the board of governors that the petitioner should be disbarred. Mauer v. State Bar, 219 Cal. 271, 26 P.2d 14; Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403; Wilcox v. State Bar, 2 Cal.2d 614, 42 P.2d 631; Mills v. State Bar, 6 Cal.2d 565, 58 P.2d 1273; Kennedy v. State Bar, Cal.Sup., 88 P.2d 920. Petitioner urges, however, that the findings and recommendations are not justified because, during the period within which the acts complained of were committed, he was under the mental disability which resulted in his being adjudged insane in June, 1937. He contends further that the evidence shows that he is now completely normal and has rehabilitated himself during the period of 27 or more months that he has refrained from practicing law and that "to disbar him because of misconduct during the period when he was incapable of exercising his normal judgment and discretion would * * * be penalizing him unjustly".

Three psychiatrists testified concerning the petitioner's mental condition at the time he committed the acts complained of. Two who appeared on behalf of the petitioner agreed that he had been suffering from the manic-depressive type of insanity; one of them explained that individuals so afflicted "are fully alive to the nature of the things they are doing and the consequences of their acts * * * but they are emotionally in such a state that they can't control those things".

The third physician, who was consulted by the local administrative committee of the State Bar, stated that some of the petitioner's deviations "were certainly the result of conscious processes, dictated by urgent necessity, especially where financial difficulties were concerned * * *" and that "there were other situations in which morality, as such, did not enter, and in which he could exercise no conscious control of his actions". This doctor was of the further opinion that petitioner "would not be able to handle himself in any better manner than he has in the past, because he still shows marked emotional instability and only fair insight" and in view of this fact he did not believe that it would be safe for the petitioner in the interest of society to continue the practice of law.

[3] It is clear that there is substantial support in this evidence for the finding of the local administrative committee that the petitioner was not incompetent during the period when his transgressions occurred. Undoubtedly, as stated by Dr. Wolfsohn, the petitioner's acts were dictated by urgent financial necessity. But neither necessity nor misfortune is a defense to the attorney who uses the money of his clients.

It is ordered that the petitioner be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys to be effective on and after January 15, 1940.

---

14 Cal.2d 548

PEOPLE v. GREIG.

Cr. 4234.

Supreme Court of California.

Nov. 9, 1939.

1. Criminal law 🔑311

A person charged with a crime is presumed to be sane until the contrary is established by a preponderance of the evidence.

2. Criminal law 🔑260(11)

In homicide prosecution, the trial court sitting without a jury was the sole judge of the weight to be given to the evidence offered to establish that defendant was insane at time of commission of homicide.

3. Criminal law 🔑260(11)

The finding of the trial court sitting without a jury on the issue of insanity in a criminal case cannot be set aside or disturbed if there is any substantial and credible evidence in the record to support the finding.

4. Criminal law 🔑260(11)

The contention that the evidence preponderated in favor of defendant's plea of insanity was properly made before trial court in homicide prosecution, but the contention could not be urged before the Supreme Court on appeal, and the only question on appeal was whether there was any substantial evidence supporting trial court's finding against defendant on the issue of insanity.

5. Criminal law 🔑260(11)

Evidence supported trial court's finding that defendant charged with murder was sane when he stabbed girl companion with a hunting knife.

6. Criminal law ⚿1166(1)

If statute fixing order of proof in proceeding to determine sanity of an accused applied in trial of defendant who had entered a plea of not guilty by reason of insanity to murder charge, error, if any, in permitting the prosecution to introduce testimony concerning offense instead of allowing defendant to open case and offer evidence in support of his plea was not prejudicial where defendant made no objection to procedure, and court gave him an opportunity to present fully his evidence in support of plea. Pen.Code, § 1369.

7. Criminal law ⚿274

Where defendant withdrew his plea of not guilty to murder charge and stood trial solely on plea of not guilty by reason of insanity, withdrawal of plea of not guilty was tantamount to a plea of guilty, and defendant was precluded on appeal from raising question concerning his intent in taking decedent's life and concerning whether he acted maliciously in killing her, and the only question before the trial judge and before the Supreme Court on appeal was the degree of murder. Pen.Code, §§ 187, 189, 1181.

8. Homicide ⚿253(1)

Evidence was sufficient to sustain conviction for first degree murder of girl companion whom defendant stabbed with a hunting knife. Pen.Code, §§ 187, 188.

9. Homicide ⚿233

Proof of motive in the commission of murder is not essential to sustain a conviction. Pen.Code, § 187.

In Bank.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Rodney Greig was convicted of first degree murder, and he appeals.

Affirmed.

Charles H. Brennan, of San Francisco, and Leo A. Sullivan, Carlisle C. Crosby, and A. J. Woolsey, all of Oakland, for appellant.

Earl Warren, Atty. Gen., F. Walter French, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., and Leonard J. Meltzer, Asst. Dist. Atty., all of Oakland, for respondent.

CURTIS, Justice.

The appellant herein was charged with the crime of murder. He entered pleas of not guilty and not guilty by reason of insanity. Thereafter he withdrew his plea of not guilty, waived a trial by jury, and his case came on for trial by the court acting without a jury. The court first heard evidence upon his plea of not guilty by reason of insanity, and at the conclusion of the hearing found that the appellant was sane at the time of the commission of the crime charged. Thereupon the court held a further hearing at which evidence was taken to determine the degree of the crime of murder of which the appellant was guilty. Upon the hearing, the court determined that the appellant was guilty of murder of the first degree and fixed his punishment at death. A motion for a new trial was denied by the court. This appeal from the judgment rendered herein comes before us by virtue of the provisions of section 1239 of the Penal Code directing that when judgment of death is pronounced an appeal is automatically taken from said judgment.

The facts of this case present one of the most shocking and indefensible homicides to be found in the criminal history of this state. A youth on the threshold of manhood, being barely twenty-one years of age, holding a responsible position as stenographer and statistical clerk in the office of one of the transcontinental railroads, without any provocation or reason, suddenly plunged the blade of a large hunting knife, some six inches in length, into the heart of a young girl about his own age with such force that it pierced her breast bone, the right lung, the pericardium, the right ventricle of her heart and entered a large vein behind the heart, with the result that his victim suffered instant death. The facts in more detail, gained principally from his own voluntary statement, show that on the evening of December 6, 1938, he met Leona Vlught in a cafe in Oakland. "Several months" prior thereto, he had met her for the first time at this same cafe and "went out with her at that time". Since then and the evening of December 6, 1938, he had not seen her to go out with her. During these intervening months, he had only seen her to say, "hello". He had no previous engagement to meet her on the evening of December 6th. On that occasion he arrived at the cafe at about 10:30, and remained there approximately three hours, or until about 1:30 of the next morning, spending part of the time with the girl, while she during the evening associated with other patrons of the place as well as with appellant. The appellant did not take the witness stand at his trial, but soon after his arrest, he made a statement to a police officer of the actions of himself and Miss Vlught after they left the cafe. This officer as a witness in the case, related appellant's statement, apparently in appellant's own words, as follows:

"I left to get my car to take her home. We met in front of the Wonder Bar. I was not alone. Joe Moore went with me to get the car and he left after I picked Leona up. While on Twelfth Street met two girls and a fellow and talked a little while, five or ten minutes. We decided to go home. We decided not to go home and went to Acme Club in El Cerrito and had some noodles. Stayed there until about 3:10, that is in the morning. We went there because of a good cook out there. From there we went out on the county farm, turned around and then went up on the top of 106th Avenue and parked after hitting a big ditch. She then complained about her appendicitis when the car jolted her. She sat and talked a long time from about 3:45 to 5:00 a. m. Then I got out and urinated. After I did I came back to the right side of the car, not to the driver's side and she was still complaining about her appendicitis hurting and about her family trouble. She was going to take poison. That her father would miss her for a couple of weeks and her mother a little longer, then forget her. I took out the knife and showed it to her jokingly and told her she did not have the nerve to use it. I handed it to her, the handle toward her, and she grabbed it. Then I twisted it out of her hand. We discussed how sharp it was and I pricked her on the skin of the throat lightly and asked her if she was afraid to have it go all the way in, and she said, 'You would be doing me a favor', and we talked along in that tone for a couple of minutes. I had the knife by the handle, without any more ado, I gave it a thrust. I stood back and left it in about fifteen minutes. She was still in the front seat. I then took the knife out and dragged her over to a gully. I then cut the dress away and stuck the knife into the skin at the throat to see if there was any blood. There was not. So I drove away and I went to East 14th Street and down to Oakland, then home in Berkeley." The officer further testified, "He was asked how about the hat and the other things. He said, 'It was in the car until tonight when I put it in the paper sacks and threw them in the garbage can where I showed you,' He was asked 'How about the jewelry?' He answered, 'I put that in my pocket at 5:30 tonight. The necklace was around her neck, but it broke when I took her out of the car.' He was then asked, 'You knew it was wrong to kill her? He said, 'I know now that I did wrong, yes.' 'Did you always carry a knife?' He said, 'Only when I went in that lower part of town.' 'You carried it with you when you went around to those cafes?' He said, 'Yes'."

The evidence further shows that appellant arrived at his Berkeley home at about six o'clock in the morning of December 7th. He went to his place of employment at the usual time that morning, worked through the day, went home, had dinner, and went to bed. Appellant lived with his parents and two younger brothers in the family home in Berkeley. The body of the girl was found at about 9:30 on the morning of her death by an employee of the United Air Lines in a little ravine or gulch, apparently where it had been placed by the appellant earlier in the morning. The Oakland police were notified, and soon arrived and viewed the body. Later pictures of the body as it lay in the ravine were taken and at the trial introduced in evidence. The examination of the case led the officers to suspect the appellant as the perpetrator of the crime. They went to his home and arrested him at about 9:30 of the evening of December 7th. After his arrest, appellant was taken outside his home, and directed to unlock his car which was parked nearby. He was asked about some jewelry belonging to Miss Vlught which he denied having. Inspector Duffy who was inspecting the car found three bobby bins, and stated they were similar to pins which had been picked up at the scene where the body was found. Appellant said nothing when these pins were produced, and Inspector Duffy went back to the car and soon returned with a hunting knife. When the knife was produced, the appellant stood for a moment and then said, "You have got me." He was asked if that was the knife that he had used "in the act where the girl met her death." He replied, "Yes." To the further question propounded to him as to why he killed the girl, he replied, "Oh, just a silly argument." After delivering to the officers certain effects of the girl consisting of a watch, a locket and chain, two keys, and a miniature photograph, the appellant directed the officers to an ash can in which he said he had thrown her hat, purse, and other articles, all of which were found in two paper sacks in the ash can. He was then taken to the City Hall at Oakland where the statement herebefore quoted from was made to the police officers.

On the following day, December 8th, the appellant made a further statement of the same events to the district attorney. This statement was by questions and answers and was taken down in shorthand. The facts therein related differ but slightly from those contained in the statement given to the arresting officers. He told that after he had plunged the knife into the chest of the girl, he walked back away from the machine and stood there smoking cigarettes for about fifteen minutes when he returned to the car, and to quote his own words, "And she wasn't making any motion or anything, so I took her out of the automobile and went over to this ditch that we had run into, and I cut away the top of her dress and examined the wound, and then I stabbed her in the neck to see if there would be any blood flowing. Since no blood flowed, I knew she was dead, and I left immediately." He then related his various movements from then on until he arrived at his home in Berkeley.

Appellant first contends that the evidence taken at the trial on his plea of not guilty by reason of insanity preponderated in favor of said plea and showed that he was insane at the time of the commission of the homicide.

[1-3] It is the settled rule in this state that a person charged with crime is presumed to be sane until the contrary is established by a preponderance of the evidence. People v. Williams, 184 Cal. 590, 593, 194 P. 1019. The jury, or in this case the trial judge, was the sole judge of the weight to be given to such evidence. The finding of the court upon the issue of insanity cannot be set aside or disturbed if there is any substantial and credible evidence in the record to support such finding. People v. Willard, 150 Cal. 543, at page 553, 89 P. 124, at page 128. In that case the court fully considered this question and answered it in the following language: "This court cannot disturb a verdict unless there is no evidence to support it, or where the evidence relied on by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict as to convince this court that its return was the result of passion or prejudice on the part of the jury. In a case presenting any of these features this court would deal with it as a matter of law. Such a situation, however, can only be presented on appeal in extreme cases, and, notwithstanding the claim of appellant, the record before us does not disclose any such case. It presents the usual and ordinary situation where the evidence was conflicting as to the only real question in the case —the insanity of the appellant—and the jury finding against it, and their finding being supported by material evidence, is conclusive on this court."

[4] Of course, the same rule applies to the finding of the trial court when the action is tried by the court without a jury. If there is material evidence in the record supporting such finding, it is conclusive on a reviewing court. We do not understand that appellant contends that there was not substantial and material evidence before the trial court in support of the finding of the court that the appellant was sane at the time of the commission of the homicide. The only claim which he makes respecting the sufficiency of the evidence is that it preponderated in favor of his plea of insanity. This claim was properly made before the trial court, and decided against the appellant. This claim has no place on his appeal, as the only question before the court on appeal, as stated before, is whether there is any substantial evidence supporting the finding of the trial court.

[5] An examination of the testimony in this case reveals ample evidence from which the trial court concluded that appellant was sane. His mother did testify respecting her son's early life and told of spells, four in number, which had similarity in some respects to epileptic seizures, the last of which occurred during appellant's sixteenth year, over four years prior to the date of the crime of which he was accused. She also testified that he was sullen and morose at times, and of his lack of sociability, and that on occasions his acts appeared irrational. She revealed that he had been arrested for petty offenses, and that as he approached maturity he had taken to drinking. She told of his early marriage and its annulment, that he had threatened to commit suicide, and gave details of many unusual actions and propensities. There was also given in evidence the appellant's family history in which it was shown that there were a number of definite cases of insanity, drunkenness and suicides among his antecedents

both in the paternal and maternal branches of his family.

Five experts were examined and testified on the subject of appellant's sanity. Two were produced by the appellant, one of whom, Dr. Sidney K. Smith, testified that in his opinion the appellant was insane in the legal sense at the time he killed the girl but was at the date of the trial perfectly sane. The other expert, Dr. Edward W. Twitchell, produced by the appellant, was not so positive in his statement as to the appellant's state of mind at the time of the homicide. When asked what his judgment was in view of the whole case, he replied. "It is quite possible that he, or even probable, that he had an epileptic equivalent at that time [the killing]. The whole thing seemed to me to be so utterly without excuse, carefully as I questioned him, I was unable to find anything that seemed to make it necessary or expedient to him to do what he did. The act seemed to be a senseless automatic sort of an act." Dr. Smith had testified that appellant was in an "epileptic equivalent" at the time of the homicide; that while in such a state the person so affected is partially unconscious to such an extent that he does not know the difference between right and wrong. The witness was of the opinion that this condition came over appellant just before he plunged the knife into his victim's body and continued something like one-half hour thereafter.

This condition is described as an unconscious state suffered by some epileptics as an equivalent of the seizures which the same or other persons may at other times suffer in connection with epilepsy. All the experts were in accord with the theory that a person while in the state or condition, denominated by them as "an epileptic equivalent", is unconscious of his acts and therefore there is no possibility of there being any malice or premeditation regarding any act committed by him while in that state.

Dr. Smith's opinion that appellant was insane at the time he killed the deceased was based upon his conclusion that at that time the appellant was in "an epileptic equivalent". Dr. Twitchell, the other expert called by appellant testified as follows: "Unconsciousness and memory don't reconcile. The individual who is unconscious does not remember the things which occurred during the time of his unconsciousness. That is one of the distinguishing features in separating epilepsy and hysteria." He further testified that, "It is quite possible that he, or even probable, that he had an [epileptic] equivalent at that time [referring to the time of the killing], and what he did may have been done during an equivalent, as to whether or not he had an equivalent at that time, I cannot swear as I was not there." With Dr. Twitchell testifying that he could not swear that appellant had an epileptic equivalent at the time of the killing, this leaves the evidence of Dr. Smith as the sole support of the defense's theory that appellant killed the girl while laboring under a condition of mind in which he was unconscious, and therefore acted without malice or premeditation. Each of the three experts appointed by the court testified that he was of the opinion that the appellant was not in an epileptic equivalent but was sane at the time he killed the deceased. All five of these medical experts were examined at length by the attorneys both on direct and on cross-examination and by the court as well. It would serve no useful purpose to detail the evidence of each witness and to set forth the reasons for their respective views. Conceding that each gave a plausible and reasonable explanation for his opinion respecting the appellant's mental condition, it would appear rather unreasonable to contend that the evidence of these three experts under the circumstances hereinbefore related was not sufficient to support the finding of the trial court that the appellant was sane at the time of the homicide. Indeed, when we consider that three reputable physicians testified to the appellant's sanity, one was in doubt as to his mental condition, and the other one was of the opinion that he was of unsound mind at the time in question, it might reasonably be said that the preponderance of the evidence was against the plea of insanity interposed by appellant.

There is another consideration which we think worthy of mention in connection with the evidence of these experts, and particularly with that of Dr. Smith. One of the invariable consequences of one laboring under the condition of an epileptic equivalent according to the undisputed evidence of these experts, is his unconsciousness of what transpires during the continuance of this condition and his failure to remember the things which occurred during the time of his unconsciousness. Yet the evidence is without dispute or conflict that the appellant on the night of his arrest made a statement to the arresting officers in which he related every detail of what occurred that night from the time he met the deceased until his return home in the early hours of the next morning including every act of his, both immediately before, at the time of, and subsequent to the killing of his victim. The same may be said respecting his statement given to the district attorney on the following day. His two statements respecting his actions on the occasion in question are in perfect agreement, except that the statement made to the district attorney goes into more details of the killing than his prior statement to the officers, as the later statement was brought out by questions propounded to him by the district attorney, which were directed to every conceivable act of either the appellant or the deceased from the time he left his home in the evening after dinner until he was arrested on the evening of the following day. In this searching examination given him by the district attorney, he did not deviate in any material respect from the voluntary statement he had given the officers on the night of his arrest. The only detail of any particular importance which he omitted from his first statement, and which was given to the district attorney, was that after he had plunged the knife into the breast of the girl he walked away a couple of steps and stood there for about fifteen minutes smoking cigarettes and then returned to the automobile and removed the knife which was still imbedded in the body of his victim. The relation by appellant of all of these events that transpired during the time just referred to would seem to be a complete refutation of the claim that appellant was then in a condition in which he was unconscious of his acts.

If then we were called upon to rule upon the question as to whether the evidence upon the issue of appellant's insanity preponderated in favor of or against his plea of insanity, we would be compelled to hold that not only did appellant fail to prove by a preponderance of the evidence he was insane at the time he committed the homicide, but that the preponderance of the evidence sustains the claim of the prosecution that appellant was sane at that time. However as stated above, the question of the preponderance of the evidence is not before us. Our inquiry is to determine whether the record contains substantial evidence in support of the finding of the trial court upon the issue of appellant's sanity, and having determined that question our task is at an end.

[6] Appellant next contends that the court erred to his serious prejudice in the order of proof upon the issue of his sanity. As we have seen, appellant withdrew his plea of not guilty and rested his case solely upon his plea of not guilty by reason of insanity. At the inception of this hearing the court made the following statement: "I might state to the other gentlemen [undoubtedly referring to the attorneys for the appellant] that I have asked Mr. Coakley [the deputy district attorney] instead of resting upon the presumption of sanity, that I might get the picture of this case from the start, that some, at least some of the evidence surrounding the offense, be put before the court so that the court might not only have a picture of what happened, but that the medical experts here might also have the picture." No objection by appellant having been made to this suggestion of the court, the prosecution proceeded to introduce as witnesses, the mother of the deceased girl, the two officers who arrested the appellant, together with the statement made to them by appellant on the night of his arrest, and two physicians, one of whom had performed an autopsy upon the body of the deceased girl and the other of whom had made laboratory tests of certain specimens taken from the deceased's body. No evidence, expert or otherwise, bearing upon the appellant's sanity was either offered or admitted at this time.

Appellant contends that the order of proof in a proceeding to determine the sanity of a person accused of crime is fixed by section 1369 of the Penal Code, and that by the provisions of that section the order of proof is fixed as follows, first, counsel for the defendant must open the case and offer evidence in support of the allegations of insanity, second, counsel for the people may then open their case and offer evidence in support thereof, third, the parties may then each offer rebutting evidence.

This section of the code applies only to an "Inquiry into the Insanity of the Defendant Before Trial or After Conviction." It is not expressly made applicable to the trial of a defendant upon his plea of not guilty by reason of insanity. Neither section 1026 of the Penal Code, which among other things provides for the trial of the question of a defendant's sanity after his plea of not guilty by reason of insanity, nor any other section of said code of which we have any knowledge, contains any express directions as to the order of proof to be followed in such a trial. Assuming, however, that section 1369 of the Penal Code is applicable to a trial of a defendant who has entered a plea of not guilty by reason of insanity, and, therefore, the defendant in such a case has the right to open the case and offer evidence in support of his plea of not guilty by reason of insanity, we are unable to conceive of any legal reason for holding that the appellant was prejudiced by the procedure followed in this case. After the comparatively brief testimony offered by the prosecution at the suggestion of the court in order that the latter might receive "a picture of the case", the appellant was given an opportunity to fully present his evidence in support of his plea of not guilty by reason of insanity. His evidence including the cross-examination of his witnesses is included in 700 pages of the 1200 pages of the reporter's transcript in this action. Appellant offers no argument nor suggests any reasonable theory to support his claim that he was prejudiced by the court's direction respecting the order of proof at the trial of his sanity, nor does he cite us to any authority which tends to support this claim. We are satisfied that if the court committed any error in so directing the order of proof, and we do not hold that it did, any such error was harmless and resulted in no prejudice to appellant.

[7, 8] Finally the appellant contends that the evidence was not sufficient to justify the finding of the trial court that appellant was guilty of murder in the first degree and he claims that by virtue of the power and authority with which an appellate court is now clothed by the provisions of section 1181, of the Penal Code, it is our duty to reduce the degree of crime from murder of the first degree as fixed by the trial court to murder of the second degree. In support of his contention, he relies upon People v. Kelley, 208 Cal. 387, 281 P. 609, and People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385. In each of these two cases the defendant was found guilty of murder in the first degree and the death penalty imposed. In the Kelley case, the judgment was modified and reduced to manslaughter on the ground that there was nothing in the record from which it might with reason be argued that the injuries inflicted on the deceased were inflicted "with that intent or that malice aforethought which is a necessary ingredient of the crime of murder". [208 Cal. 387, 281 P. 611.]

That question cannot arise in the present case for the reason that the appellant withdrew his plea of not guilty and stood trial solely upon his plea of not guilty by reason of insanity. The withdrawal of his plea of not guilty under those circumstances was tantamount to a plea of guilty. People v. Kimball, 5 Cal.2d 608, 55 P.2d 483. Having pleaded guilty to the charge of murder, the appellant is now precluded from raising the question as to his intent in taking the life of the deceased and also as to whether he acted maliciously in killing her. Murder is defined as "the unlawful killing of a human being, with malice aforethought". Section 187, Penal Code. The only question before the trial judge was the degree of the crime of murder, as the degrees of murder are defined under section 189 of the Penal Code. Under appellant's present contention that is the sole question now before us. The Kelley case can therefore be dismissed without further comment. A somewhat different situation was before the court in the Howard case. The defendant had pleaded not guilty, but the jury had found him guilty of murder in the first degree. He contended on appeal that the evidence was insufficient to sustain the verdict of the jury finding him guilty of murder in the first degree. In reviewing the evidence, this court concluded that it was sufficient to sustain a charge of murder in the second degree only, and directed a modification of the judgment accordingly. In that case we held [211 Cal. at page 329, 295 P. at page 336, 71 A.L.R. 1385]; "To be murder of the first degree, under our statute, the killing must be premeditated, except when done in the perpetration of certain felonies; that is to say, the unlawful killing must be accompanied with a deliberate and clear intent to take life. If the act be preceded by, and be the result of, a concurrence of will, deliberation and intent, the crime of first-degree murder is proved. People v. Bellon, 180 Cal. 706, 182 P. 420." However, in the discussion of the evidence which consisted principally of the defendant's confession, we held that it was not legally sufficient to sustain a conviction of murder in the first degree. We find no such infirmity in that respect in the evidence before us, even if we confine our review thereof to the confession of the appellant. His account of the killing has already been set out in full. In this account he told that the girl complained about her appendix hurting her and about her family trouble; that she was going to take poison; that her father would miss her only a couple of weeks and her mother a little longer; that he then took out the knife and showed it to her jokingly and told her she did not have the nerve to use it; they discussed how sharp it was and he pricked her on the skin of the throat lightly and asked her if she was afraid to have it go in all the way and she replied that he would be doing her a favor, and that they talked in that way a couple of minutes; that he had the knife in his hand and without any more ado, he gave it a thrust, and stood back and left it in about fifteen minutes. If we accept this statement of appellant as a true account of the killing of the deceased, it shows a clear case of murder in the first degree, and removes from the case entirely any principle of law announced in the Howard case.

[9] It is argued that there is an entire absence of any evidence showing any motive on appellant's part which would prompt him to take the life of the decedent. It has been held on innumerable occasions by this court and other appellate courts of this state that proof of motive in the commission of the crime of murder is not essential to sustain a judgment of conviction. We cite in support of this principle of law only the recent case of People v. Larrios, 220 Cal. 236, 251, 30 P.2d 404, and 13 Cal.Jur., p. 685.

It is further claimed that there is no proof that the killing of the deceased was malicious. The evidence conclusively showed that there was a deliberate intention on the part of the appellant to unlawfully take the life of the deceased, and malice is express when there is manifested a deliberate intention to take the life of a fellow creature. Sec. 188, Pen. Code.

Some question is raised as to whether the killing of the deceased was done with sufficient deliberation to amount to premeditation on the part of the appellant. We have seen from the quoted statement of the appellant, made to the arresting officers, and thereafter confirmed by a later examination by the district attorney, that defendant and deceased for some minutes prior to the killing discussed the possibility of his taking her life. They commented on the sharpness of the knife blade. He pricked her throat lightly with the point of the knife and asked her if she were afraid to have it go all the way in and she replied that he would be doing her a favor, and they talked in that tone a couple of minutes when without further ado he plunged the knife into her breast to its very hilt. Probably a more complete case of premeditation has never been made out in the courts of this state than the one we have here from the lips of the appellant himself.

In the early case of People v. Hunt, 59 Cal. 430, 435, it was said: "It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing." This language has been approved repeatedly by later decisions of this court, and has been quoted with approval in the following of our recent decisions: People v. Bellon, 180 Cal. 706, 710, 182 P. 420; People v. Fleming, 218 Cal. 300, 310, 23 P.2d 28; People v. Larrios, 220 Cal. 236, 252, 30 P.2d 404.

In the Fleming case, after quoting the language of the Hunt decision, the court added [218 Cal. 300, 23 P.2d 32], "The precise language of this decision has been repeated on numerous occasions by this court, and the principle there enunciated is irrevocably established as a part of the law of this state."

In the case of People v. Bellon, 180 Cal. 706, 710, 182 P. 420, 422, we find the following language: "It is difficult to attribute any other design than that of killing to one who knowingly strikes at the throat of another with a sharp razor with such force and strength as to cause death." This language, in our opinion, aptly applies to the case against appellant herein. We find it most difficult to come to any other conclusion than that of wilful, deliberate murder from the act of the defendant in plunging the sharp blade of the hunting knife into the breast of the deceased with such force and strength as to pierce her lungs and heart, causing her instant death. In our opinion, the evidence amply supports the finding of the trial court that the degree of murder of which the appellant is guilty is murder in the first decree.

The judgment is affirmed, and the order denying appellant's motion for a new trial is affirmed.

We concur: HOUSER, J.; CARTER, J.; SHENK, J.; EDMONDS, J.

---

35 Cal.App.2d 464

PEOPLE v. HARRIS.

Cr. 3259.

District Court of Appeal, Second District, Division 1, California.

Nov. 15, 1939.

Embezzlement ⚿48(4)

In prosecution for grand theft, where there was no evidence that defendant had "appropriated" the property, but defendant took the position that he had always owned the property, failure to instruct that open and avowed appropriation of the property under claim of title preferred in good faith was a sufficient defense was not error. Pen. Code, § 511.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Van Courtland Harris was convicted of grand theft, and he appeals.

Affirmed.

Thomas P. Cruce, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was found guilty by a jury of grand theft, and appeals from the judgment and from the order denying a motion for a new trial. The subject-matter of the theft was an oriental rug which had been purchased in 1930 for the sum of $1,450, by J. T. Dye. The evidence reveals that Mr. Dye, after having made several attempts to sell the rug, delivered it to appellant for display only, on November 23, 1938. On December 12, 1938, the defendant and appellant delivered it to one Ralph Edington, an attorney, to secure the payment of a prior indebtedness and further advances. Defendant signed a note for $573.61 to cover the indebtedness and advances, and executed a formal pledge agreement, pledging the rug as security for the debt.

Appellant had promised to see Mr. Dye on the day following the delivery of the rug to him, the defendant. However, several months had elapsed before defendant was located—numerous attempts to communicate with him having failed—at which time the defendant assured Mr. Dye that efforts were being made to find a purchaser. Defendant concealed from Mr. Dye the fact that the rug had been pledged to Edington.

At the time of defendant's arrest he denied all knowledge of the rug or of its whereabouts, but later admitted that it was at Mr. Edington's office; whereas, at the trial, defendant contended that he owned the rug, which he declared had been in his possession since 1929. He denied that Mr. Dye had ever been the owner thereof.

Mr. Dye's testimony, however, was abundantly corroborated in all of its important details; indeed, it is not contended by appellant that the evidence is insufficient to sustain the conviction.

Appellant's sole contention on appeal, in substance, is that the court erred in failing to instruct the jury that under the provisions of section 511 of the Penal Code, it was a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable.

The contention is without merit. There was no evidence in the record that the defendant had "appropriated" the property openly and avowedly. To the contrary, it was defendant's position at the trial that he had always owned the property. There was no evidence of appropriation on any theory; hence the instruction was properly refused.

The judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; WHITE, J.

REEVES v. VALLOW.*

Civ. 11879.

District Court of Appeal, Second District, Division 1, California.

Nov. 10, 1939.

Rehearing Denied Dec. 5, 1939.

Hearing Granted Jan. 8, 1940.

1. Executors and administrators ⊂⇒205(1)

One rendering services under oral contract for compensation from estate of person served after his death can recover therefor, if at all, only on quantum meruit.

2. Assumpsit, action of ⊂⇒19

A complaint based on quantum meruit is sufficient as against either general or special demurrer when set forth in form of common count.

3. Executors and administrators ⊂⇒443(5)

In action against administrator to recover compensation for services rendered to decedent, complaint alleging in substance requirements of common count stated cause of action on quantum meruit, though apparently based on express oral agreement to compensate plaintiff from decedent's estate.

4. Work and labor ⊂⇒4(1)

In action on quantum meruit for services rendered, recovery may be had in absence of express oral agreement to pay for such services.

5. Work and labor ⊂⇒27(2)

In action on quantum meruit for services rendered, evidence of express oral agreement to pay therefor is relevant as tending to show that services were not gratuitous.

6. Work and labor ⊂⇒26

Recovery on quantum meruit for services rendered requires proof that services were performed and accepted and that accepter received benefits thereof without payment therefor, whereupon it becomes material to prove their value, which law implies promise to pay.

7. Wills ⊂⇒433

In action against administrator for value of services rendered to decedent under alleged oral contract to compensate plaintiff therefor from decedent's estate, a copy of will, alleged in verified complaint to have been executed by decedent in plaintiff's favor, was admissible in evidence as declaration against interest, though allegations as to will were stricken from complaint.

8. Executors and administrators ⊂⇒221(3)

In action against administrator for value of services rendered to decedent, evidence of records of plaintiff's and decedent's bank accounts and transactions in connection with which defendant contended that plaintiff was compensated by decedent was admissible.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Clara Reeves against Jesse A. Vallow, as administrator of the estate of John Fletcher Kratzer, deceased, for the value of services rendered for deceased by plaintiff. Judgment for plaintiff, and defendant appeals.

Reversed.

Edwin J. Miller and Samuel H. Peck, both of Los Angeles, for appellant.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by the defendant from a judgment of $25,000, against him, as administrator of the estate of John Fletcher Kratzer, deceased, in favor of the respondent Clara Reeves, for services which it is alleged were rendered for the deceased by the respondent from May 1, 1928, until the death of Kratzer on March 7, 1936.

The complaint alleges:

"That on the first day of May, 1928, John Fletcher Kratzer, now deceased, moved into the home of plaintiff and thereafter constantly lived with plaintiff either at her home or at a later time at 1726 Taft Avenue, Hollywood, California, until his death.

"That on or about the said first day of May, 1928, the said John Fletcher Kratzer requested the plaintiff to care for him, assist him in his business and act as a companion and nurse to him and told plaintiff that if she would work for him in such capacity as long as he lived, he would richly compensate her for her labors.

"That thereafter in the year 1931, the said John Fletcher Kratzer told defendant that he would give her $20,000.00 for her efforts, the same to be payable upon his death and out of his estate, and that he would further pay her the sum of $100.00 per month from the date of his death until distribution of said $20,000; that pursuant to said agreement the said John Fletcher Kratzer did execute his last will and testa-

*For subsequent opinion see 104 P.2d 1017.

ment, a copy of which, marked Ex. 'A' is hereunto annexed, which was duly subscribed, published and declared to be his last will and testament, in the presence of two witnesses;

"That plaintiff is informed and believes and upon that ground alleges that said will executed in 1931, has been either lost or destroyed, but that the witnesses to said will are still living.

"That thereafter in the year 1935, the said John Fletcher Kratzer promised and agreed to deliver to plaintiff, in addition to the $20,000.00 theretofore agreed upon, a home of the value of $10,500.

"That relying upon the promise of the said John Fletcher Kratzer, plaintiff accepted his offer and commenced her work under said offer on the first day of May, 1928, and did work continuously for the said John Fletcher Kratzer until his death on March 7, 1936. That the reasonable value of said services was and is the sum of $30,500, no part of which has been paid."

It is further alleged that plaintiff filed a creditor's claim with the administrator and that ten days having elapsed since the presentation of such claim, plaintiff elected to consider said claim rejected.

It is contended by appellant: (1) That the complaint fails to state a cause of action; (2) that the statute of limitations bars plaintiff's recovery for more than two years' services; (3) that the court erred in excluding evidence offered by defendant and in admitting improper evidence offered by plaintiff; (4) that the court erred in the giving and refusing of certain instructions; (5) that the verdict and judgment are against the evidence; (6) that the verdict and judgment are excessive and as a matter of law are a result of passion and prejudice; (7) that the misconduct of the trial judge was prejudicial.

[1] At the outset it should be emphasized that if plaintiff can recover at all such recovery can be had only upon an action in quantum meruit. Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146. In the Long case the court declared: "The alleged oral contract to compensate the respondent by leaving her the entire estate upon the death of the Frickes is unenforceable * * * and a recovery, if any, must be based upon the theory of quantum meruit." Long v. Rumsey, supra, 12 Cal.2d page 341, 84 P.2d at page 149.

[2-6] Referring to appellant's first contention above mentioned, it appears to be well settled that a complaint based upon quantum meruit, is sufficient when set forth in the form of a common count, as against either a general or a special demurrer. 27 Cal.Jur., p. 219. The complaint herein apparently seeks to base plaintiff's cause of action upon an express oral agreement; nevertheless, whether intentionally or accidentally, it does in fact allege in substance the requirements of the common count and hence was good as against appellant's objection in that regard. In an action upon quantum meruit manifestly recovery may be had in the absence of an express oral agreement. It is true that in the trial of such an action evidence of an express oral agreement is relevant, not, however, because the cause of action is based thereon but because such evidence tends to establish the fact that the services in question were not gratuitous. Quantum meruit requires proof that the alleged services were performed and accepted; that the accepter received the benefits thereof without payment therefor. Such a state of facts being proven it then becomes material to prove the value of such services, for which, when established, the law implies a promise to pay.

[7, 8] Referring to appellant's third contention, namely, that the court erred in excluding evidence offered by defendant, it is urged, among other claims in that regard, that the ruling of the trial court in sustaining an objection to the introduction in evidence of a copy of decedent's will as originally alleged in plaintiff's complaint, was highly prejudicial. At the beginning of the trial the court granted plaintiff's motion to amend the complaint by striking therefrom the allegation, "* * * that pursuant to said agreement the said John Fletcher Kratzer did execute his last will and testament, a copy of which, marked Ex. 'A' is hereunto annexed, which was duly subscribed, published and declared to be his last will and testament, in the presence of two witnesses." The alleged will referred to as "Ex. A" and dated December, 1931, contained the following provisions: "Eighth: I bequeath to Clara Reeves of Hollywood, California, the sum of Twenty thousand ($20,000.00) Dollars. Until said devisee receives said bequest, I bequeath to her the sum of One Hundred ($100.00) Dollars per month which said monthly sum shall not be deducted from her bequest, ex-

cept that should partial distribution be made to her, then the monthly payment, above provided, shall be reduced pro rata." "I have been residing with Clara Reeves and all sums due her are paid except for the current month."

The complaint was verified by the plaintiff and although the portion thereof sought to be introduced was stricken, nevertheless it remained in effect a declaration against interest and was therefore admissible. Among other things the trial court sustained objections to the introduction by appellant and defendant of evidence of the records of plaintiff's bank account and of decedent's bank account, also evidence of certain transactions between plaintiff and the deceased, in connection with which it is contended by appellant that plaintiff was compensated. Without going into further detail with regard to the extent to which defendant was limited in defending on the theory of payment, and as well on the value of the alleged services, it is sufficient to note that the above rulings were vital, and the evidence excluded thereby was essentially important for a jury's consideration in such an action.

It is unnecessary to give attention to the other above-mentioned contentions of appellant, but such inattention is not to be understood as indicating that they are without merit.

The judgment is reversed.

We concur: YORK, P. J.; WHITE, J.

O WEST KEY NUMBER SYSTEM

---

35 Cal.App.2d 439

JOSEPH v. VOGT et al.

Civ. 12224.

District Court of Appeal, Second District, Division 2, California.

Nov. 13, 1939.

1. Witnesses ⚷276

Testimony received pursuant to statute, authorizing examination of party by adverse party as if under cross-examination, is evidence in case and may be considered by trial jury as any other evidence properly received in determining fact issues. Code Civ.Proc. § 2055.

2. Highways ⚷172

Failure to conform to statutory requirement that one operating bicycle on highway between half hour after sunset and half hour before sunrise have such vehicle equipped with lamp, emitting white light visible under normal atmospheric conditions for 300 feet in front of it, constitutes negligence per se. Vehicle Code, §§ 618, 622, St.1935, pp. 201, 203.

3. Automobiles ⚷245(90)

Whether bicyclist's negligence in operating bicycle without light over half hour after sunset contrary to statute proximately contributed to collision between bicycle and automobile turning left in front of bicycle at street intersection was fact question for jury to determine from all evidence in action against automobile driver for bicyclist's death. Vehicle Code, §§ 618, 622, St.1935, pp. 201, 203.

4. Appeal and error ⚷1001(1)

A jury's determination, supported by substantial evidence that bicyclist's negligence in operating bicycle without light over half hour after sunset contrary to statute proximately contributed to collision between automobile and bicycle, is conclusive on appeal from judgment for defendant in action against automobile driver for bicyclist's death. Vehicle Code, §§ 618, 622, St.1935, pp. 201, 203.

5. New trial ⚷102(1)

To justify granting of motion for new trial on ground of newly discovered evidence, moving party must show that he used due diligence to discover and produce such evidence on trial.

6. New trial ⚷102(3)

In death action, trial court did not abuse its discretion in denying plaintiff's motion for new trial on ground of newly discovered evidence after verdict for defendant, where affidavits showed that one of affiants knew witness, whose purported testimony was set forth therein, on day of fatal accident and worked with plaintiff in making pictures of scene of accident on following day.

7. Appeal and error ⚷110

An order denying motion for new trial is nonappealable.

Appeal from Superior Court, Los Angeles County; Edward C. Purpus, Judge.

Action by Anses Joseph, father of Ernest Joseph, deceased, against John Richard Vogt, a minor, by and through his guardian ad litem, Edward Vogt, and others to recover damages for deceased's wrongful death. From a judgment for defendants and an order denying plaintiff's motion for a new trial, plaintiff appeals.

Appeal from order denying motion for new trial dismissed, and judgment affirmed.

Arthur J. Edwards, of Los Angeles, and J. L. Smith, of San Francisco, for appellant.

Sigurd E. Murphy, of Hollywood, and Bernard E. Allard, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages for the wrongful death of plaintiff's minor son plaintiff appeals. There is also a purported appeal from an order denying a motion for a new trial.

Viewing the evidence most favorable to defendants (respondents), the essential facts are:

December 28, 1937, at 5:33 p. m. defendant John Richard Vogt was driving his automobile in a northerly direction on Market street in the city of Inglewood near where it intersects with La Brea avenue. At the intersection he turned west on La Brea avenue, traveling approximately 15 miles per hour. Said defendant looked to the right and saw plaintiff's son, riding his bicycle in a southerly direction on Market street without headlights at approximately 18 miles per hour. Almost instantly he crashed into the right front fender of said defendant's car, receiving injuries from which he died.

The parties agreed that the sun set on December 28, 1937, at 4:52 p. m. and that defendants Edward Vogt and Mabel Lilliam Vogt signed their son John Richard Vogt's application for a driver's license.

These are the questions to be determined:

First: Was there substantial evidence to sustain the implied findings of the jury that (a) it was negligent for decedent to operate his bicycle after sunset without a light, contrary to sections 618 and 622 of the California Vehicle Code, and (b) such negligence was the sole proximate cause of the accident?

Second: Did the trial court abuse its discretion in denying plaintiff's motion for a new trial on the ground of newly discovered evidence?

The first question must be answered in the affirmative. An examination of the record discloses there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the facts heretofore mentioned and the implied findings of the jury set forth above. For example, defendant John Richard Vogt testified when examined pursuant to the provisions of section 2055 of the Code of Civil Procedure to the facts set forth above.

[1] There is no merit in plaintiff's contention that evidence given under section 2055 of the Code of Civil Procedure is not evidence in the case to be weighed by the trier of fact along with other properly received evidence. The law is established in California that testimony received pursuant to section 2055, Code of Civil Procedure, is evidence in the case and may be considered in determining the issues of fact by the trial jury the same as any other evidence properly received. Green v. Newmark, 136 Cal.App. 32, 37, 28 P.2d 395; Smellie v. Southern Pacific Co., 212 Cal. 540, 555, 299 P. 529; Figari v. Olcese, 184 Cal. 775, 782, 195 P. 425, 15 A.L.R. 192.

[2-4] One operating a bicycle on a highway a half hour after sunset and before a half hour before sunrise is required to have such vehicle equipped with a lamp emitting a white light visible under normal atmospheric conditions from a distance of 300 feet in front of such bicycle, secs. 618 and 622, California Vehicle Code, and failure to conform to the foregoing requirement constitutes negligence per se. Fouch v. Werner, 99 Cal.App. 557, 562, 279 P. 183. In the instant case there is ample evidence that decedent was operating his bicycle between a half hour after sunset and before a half hour before sunrise without any light on his bicycle. It was therefore a question of fact for the determination of the jury from all of the evidence whether such negligence proximately contributed to the unfortunate accident, and its determination supported, as we have heretofore pointed out, by sub-

stantial evidence is conclusive in this court.

[5, 6] The second question must be answered in the negative. On the motion for a new trial affidavits were filed setting forth the purported testimony of Mrs. May Wyrick, which testimony would have been favorable to plaintiff. However, it likewise appears from the affidavits that this witness was known to George A. Joseph, one of the affiants, the day of the accident and that he worked with the plaintiff, his brother, the day following the accident in making pictures of the scene where the accident occurred. The rule is settled in this state that, to justify the granting of a motion for a new trial on the ground of newly discovered evidence, the moving party must show that he has used due diligence to discover and produce the newly discovered evidence on the former trial. Putnam v. Pickwick Stages, 98 Cal.App. 268, 274, 276 P. 1055. There is thus a lack of a showing in the present case of a valid reason for the failure to produce the witness at the time of trial.

[7] An order denying a motion for a new trial is nonappealable. Kellett v. Marvel, 6 Cal.2d 464, 476, 58 P.2d 649. The purported appeal from the order denying a motion for a new trial is dismissed.

For the foregoing reasons the judgment is affirmed.

I concur: WOOD, Acting P. J.

---

35 Cal.App.2d 461

PEOPLE v. BOLES et al.

Cr. 3261.

District Court of Appeal, Second District, Division 2, California.

Nov. 14, 1939.

Hearing Denied Dec. 14, 1939.

1. Criminal law ⇨1144(13)

On appeal from judgments of conviction, the evidence was viewed most favorable to the prosecution.

2. Licenses ⇨40

The president and secretary of oil company issuing option to purchase stock of oil company, without first obtaining permit from state corporation commissioner, violated the Corporate Securities Act. Gen.Laws 1931, Act 3814, §§ 2(a) (8), 3.

3. Licenses ⇨18½

The issuing of option to purchase stock of oil company, without first obtaining permit from state corporation commissioner, was not within provision of Corporate Securities Act that giving of privilege to convert a security into another security of same company was not sale of security within the act, where the option did not provide for exchange of one security of oil company for another security of oil company. Gen.Laws 1931, Act 3814, §§ 2(a) (8), 3.

4. Criminal law ⇨1023(10)

An appeal does not lie from the verdict of a jury.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler and Frank M. Smith, Judges.

M. L. Boles and another were convicted for violating the Corporate Securities Act, and they appeal.

Affirmed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Reiter & Reiter and Emmett A. Tompkins, all of Los Angeles, for appellant Boles.

A. P. Entenza, of Los Angeles, for appellant Armstrong.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

McCOMB, Justice.

From judgments convicting them of violating the Corporate Securities Act after trial before a jury and from orders denying their motions for a new trial defendants appeal. There are also purported appeals from the verdicts of the jury.

[1] Viewing the evidence most favorable to the prosecution (respondent) the essential facts are:

Defendant Boles was president and defendant Armstrong secretary of Santa Fe Royal Oil Company, a corporation. April 17, 1936, the company borrowed $4,000 from John Marcin and delivered to him a note signed "Santa Fe Royal Oil Company by M. L. Boles, president, F. J. Armstrong, secretary-treasurer," dated April 17, 1936, in the sum of $4,000 payable four months after date. On the same day they delivered to Mr. Marcin an option to purchase stock of the Santa Fe Royal Oil Company, reading thus:

"Santa Fe Royal Oil Company, 707 Title Guarantee Building, 411 West 5th Street, Los Angeles, Telephone Michigan 7918, April 17, 1936.

"Option to Buy.

"To Whom It May Concern:

"This is to certify that the Santa Fe Royal Oil Company, a corporation, has this 17th day of April, 1936, given to John Marcin an option for four months to purchase four thousand (4000) shares of Santa Fe Oil Company securities, or any part thereof, at par value of $1.00 per share, lawful money of the United States. This option expires midnight, August 17, 1936. Santa Fe Royal Oil Company, by M. L. Boles, President. By F. J. Armstrong, Secretary-Treasurer."

A permit was not obtained from the corporation commissioner for the issuance of the foregoing option to purchase stock.

Defendants rely for reversal of the judgments on these propositions:

First: There was no substantial evidence to sustain the verdicts of the jury.

Second: It was not necessary to obtain a permit from the corporation commissioner before issuing the option to purchase stock set forth above, because the transaction fell within the exception set forth in paragraph 8, subdivision (a), section 2 of the Corporate Securities Act (Act 3814, vol. 2, Deering's General Laws [1931] p. 1926).

[2] The first proposition is untenable. Section 3 of the Corporate Securities Act (Act 3814, vol. 2, Deering's General Laws [1931] p. 1928) prohibits the sale until a permit has been obtained from the corporation commissioner of the state of California of a security and paragraph 8, subdivision (a) of section 2 of the same act, supra, includes among prohibited sales "an option of sale". Therefore, it is clear that, since defendants without first obtaining a permit issued to John Marcin an option to purchase 4,000 shares of the Santa Fe Oil Company securities, they violated the Corporate Securities Act and there was substantial evidence to sustain their conviction of so doing.

[3] The second proposition is likewise untenable. Paragraph 8, subdivision (a) of section 2 of the Corporate Securities Act, supra, reads in part as follows: "* * * provided, that a privilege pertaining to a security giving the holder the privilege to convert such security into another security of the same company shall not be deemed a sale of such other security within the meaning of this definition; and provided further, that the issue or transfer of a right pertaining to a security and entitling the holder of such right to subscribe to another security of the same company shall not be deemed a sale of such security within the meaning of this definition; * * *."

In the instant case the option given by defendants is clear on its face and does not provide for the exchange of one security of the corporation for another security of the same corporation. Therefore, the transaction here involved did not fall within the purview of the exception above noted.

[4] An appeal does not lie from the verdict of a jury. People v. Richardson, 23 Cal.App.2d 428, 431, 73 P.2d 610.

Therefore the purported appeals from the verdicts are dismissed.

The judgments and orders are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

---

35 Cal.App.2d 442

HOPKINS et al. v. MacCULLOCH

Civ. 2453.

District Court of Appeal, Fourth District, California.

Nov. 13, 1939.

Rehearing Denied Dec. 8, 1939.

Hearing Denied Jan. 11, 1940.

1. Municipal corporations ⟹600

The enjoyment of property cannot be interfered with or limited arbitrarily, except that the use to which one may put his property can be restricted or regulated by city in exercise of its police power, so far as is necessary to protect others from injury by such use.

2. Municipal corporations ⟹591

A provision in zoning ordinance, that planning commission finding that detriment or injury to neighborhood would not result from issuance of permit, could approve and transmit permit, together with complete report of commission's findings and recommendations to city council for approval and indorsement, was not a delegation of power or authority of city council to planning commission. St.1929, p. 1811, § 10.

3. Municipal corporations ⚷621

The planning commission created by zoning ordinance of city of Newport Beach was an advisory body only, and its powers were limited to consideration of applications for permits and to recommendations for or against allowance of permits, and commission could hold public hearings on any such application after publication of notice of hearing to the end that property owners might have an opportunity to object to granting of permit on ground that detriment or injury might result to neighborhood. St. 1929, p. 1811, § 10.

4. Municipal corporations ⚷621

Property owners who had actual notice of hearing on application for permit to remodel nonconforming building could not complain that they did not receive notice of hearing by publication, as required by zoning ordinance. St.1929, p. 1811, § 10.

5. Municipal corporations ⚷621

A provision in zoning ordinance requiring publication of notice of public hearing on application for permit to remodel nonconforming building was for the protection of the public.

6. Municipal corporations ⚷97

After planning commission's denial of application for permit to remodel nonconforming building, the council of city of Newport Beach had the right to reconsider the matter and authorize issuance of permit by full affirmative vote of all members of city council, and not by affirmative vote of only those members present, provided no structural alterations were to be made in the building.

7. Municipal corporations ⚷97

After planning commission's denial of application for permit to remodel nonconforming building, council of city of Newport Beach could not authorize issuance of permit calling for structural alterations, by affirmative vote of only those members of council who were present.

8. Nuisance ⚷80

The maintenance of grocery store and cafe in violation of zoning ordinance could be abated by injunction proceedings where grocery store and cafe constituted nuisance.

9. Nuisance ⚷80

While private persons cannot resort to equity to prevent criminal acts unless the facts substantiate the claim that the person has suffered exceptional damage to property other than that suffered by public generally, a nuisance, though constituting a private wrong, is nonetheless actionable because the wrong committed also renders the guilty party liable to criminal prosecution for common nuisance.

10. Nuisance ⚷80

An injunction would issue to restrain maintenance of grocery store and cafe which constituted nuisance under zoning ordinance, notwithstanding that ordinance contained penal provisions.

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by C. Harold Hopkins and another against Marguerite L. MacCulloch to enjoin the defendant from using her property for a nonconforming business in alleged violation of the zoning ordinance of the City of Newport Beach. From the judgment, the defendant appeals.

Affirmed.

Winterer & Ritchie, of Los Angeles, for appellant.

L. W. Blodget, of Santa Ana, Thomas H. Kuchel, of Anaheim, and George H. Tobias, of Santa Ana, for respondents.

GRIFFIN, Justice.

Respondents brought this action as persons directly and specifically injured by reason of their ownership of property immediately adjacent to appellant's property, and sought to enjoin appellant from using and permitting the use of her property for nonconforming business, in alleged violation of a zoning ordinance of the City of Newport Beach. On and prior to January 6, 1936, appellant was the owner of a parcel of land described as lot 15, block 26 of the East Side Addition of Balboa tract in the city of Newport Beach, which lot has a depth of 30 feet and a frontage of 100 feet on Central avenue and runs in an easterly and westerly direction. For a number of years the westerly 46 feet of this lot was improved with a building 10 by 24 feet in area joined to a building 18 by 24 feet in area, to which was attached a lattice-work structure of 18 by 24 feet in area, all of which was quite unsightly compared to the surrounding residential structures. For several years prior to said date and from that time to the date of the trial, the buildings and lattice-work structure had been used for the operation of a small cafe and grocery store.

On the 6th day of January, 1936, pursuant to chapter 838 of the Statutes of California, 1929, p. 1805, the city council of that city adopted zoning ordinance No. 440, designating the district in which said lot 15 was located as a single family residence district. The ordinance provided in section 12 that "The lawful use of *land* existing at the time of the passage of this ordinance, although such use does not conform to the provisions hereof, may be continued, but if such nonconforming *use is discontinued* any *future use of said land* shall be in conformity with the *provisions of this ordinance.*" (The italics used in quoted portions of ordinance are ours for purpose of emphasizing points involved.) The section also provided that "The lawful use of *a building* existing at the time of the passage of this ordinance may be continued, although such use does not conform with the provisions hereof" and that "such use may be extended throughout the building, provided no *structural alterations,* except those required by law or ordinance or *permitted under section 11 of this ordinance,* are made therein". A structural alteration, as defined by the act, is "Any change in the supporting members of a building such as bearing walls, columns, beams or girders and floor joists or roof joists." Section 11 provided that "The City Council, after receipt of a report and the recommendation of the Planning Commission in each case, as hereinafter provided, shall have the power to grant adjustment and variances in the application of provisions of this ordinance and to authorize the issuance of conditional permits," for *"the reconstruction and/or remodeling of a nonconforming building";* and that the "Application for any *permissible* variance of regulations or for any conditional permit as provided for herein shall be made to the Planning Commission in the form of a written application for a permit;" and that after receipt of the application, the commission should post the application for public inspection for not less than one week and hold a public hearing thereon and give notice thereof by publication in a legal newspaper; and that if "the Planning Commission finds that detriment or injury to the neighborhood will not result from issuance of a permit as applied for, it may approve said permit and transmit the same, together with the complete report of its findings and recommendations, to the City Council for approval and endorsement. In the event the Planning Commission *disapproves* any such application, no permit shall be issued therefor except upon order of the City Council passed by a *full, affirmative vote of all members* thereof." The ordinance also contained a provision requiring a use and occupancy permit.

Section 14 of the ordinance provided that before commencing any work, a permit must be issued by the building inspector of the city, and section 20 of the ordinance provided that any person who violated the provisions of the ordinance would be guilty of a misdemeanor, and that any building erected or maintained or used contrary to the provisions of the ordinance was thereby declared to be a public nuisance.

After the passage of this ordinance appellant continued to devote the westerly portions of said lot to nonconforming uses, and without obtaining a permit for the reconstruction or remodeling, on or about the 10th day of February, 1937, the westerly 10 by 24 foot portion of the joint building was torn down and the remaining portion remodeled and reconstructed. On February 26, 1937, appellant filed with the building inspector a written application for a permit to reconstruct the smaller building. On that same day a permit, in accordance with said application for permission to remodel and reconstruct the portion of the lunch room that was torn down, was issued by the inspector without action by the planning commission. Appellant, through her agent, E. L. Humphrey, who was the carpenter employed on the premises, was notified by the building inspector, under instruction of the city attorney, that such reconstruction was in violation of the city ordinance and was notified to cease work. Notwithstanding, appellant thereafter practically completed the entire structure on her own initiative and apparently without authority of the planning commission. On March 8, 1937, appellant obtained a permit for and thereafter constructed on the easterly portion of the same lot, without objection, a single family residence in conformity with the city ordinance pertaining thereto. On the 18th day of May, 1937, appellant, with but 3 or 4 days more work to be done, made application in writing to the planning commission and city council of that city for a permit authorizing the completion and remodeling of the nonconforming building devoted to nonconforming use, and paid a fee of $10 for such filing and permit. On May 19, 1937, that application was presented to the planning commission. On May 26, the application again came before the planning commission without publication of notice of a public hearing thereon as required by the ordinance.

The following proceedings were had: "Minutes of May 19, 1937. * * * By Chairman Parks—I am going to do an unprecedented thing and rule this application cannot be received, as in my opinion it is entirely within the discretion of the commission to refuse a hearing in this matter * * * (By Mr. Thompson [Member of Com.]): * * * The applicant has, in my opinion, abandoned the nonconforming use of this property." Thereafter the matter was laid on the table for one week and then brought up for discussion which in part was as follows: "Chairman (To Mr. Tilton City Attorney): Mr. Tilton, after hearing both sides do you feel we can allow a public hearing on this matter? Mr. Tilton: No, the matter has proceeded beyond that point. This is my advice. Motion: Moved by Com. F. W. Briggs that the application of Miss MacCulloch *be denied* (italics ours) for the reason that the construction referred to in said application is largely complete and the application consequently is out of order and not in conformity with the procedure established by Ord. No. 440." All parties to this action were present at the hearing and were represented by counsel.

On June 7, 1937, the city council instructed the city clerk to request a report from the planning commission and set a hearing on the application for June 14, 1937, and on that day the matter came on for hearing before the city council. All parties being present as before, together with a report of the proceedings of the planning commission, on motion duly made and carried it was decided by the council that "We feel that the remodeling of the nonconforming building will not in any way injure anyone affected, and if any technicalities of law are involved, that the same be left to a court of competent jurisdiction to decide * * * that the action of the Building Inspector in issuing the building permits in question be upheld and confirmed, and that the application of Marguerite MacCulloch for a permit authorizing the completion of construction and remodeling of the said nonconforming building on the lot in question be granted in accordance with the terms of said application."

It must be noted that the application dated February 26th recited: "To replace portion of apt. attached to lunch room that was torn down" (10 by 24 feet). On August 10, 1937, the city issued its permit certifying that the one-story frame building 18 by 24 feet only had been inspected and complied with the regulations of the city of Newport Beach, and authorized that it be used and occupied as a grocery store and restaurant. On October 29, 1937, the respondents instituted this action for injunctive relief against the use of the property for nonconforming cafe or grocery store purposes.

After the trial of the cause the court found that at the time of the adoption of the ordinance the two joined buildings located on one end of the lot were devoted to a nonconforming use and that on or about the 10th day of February, 1937, and prior to the 26th day of February, 1937, the appellant caused the small building (28 by 24 feet) theretofore used in the business of selling light lunches, etc., to be partially destroyed and removed; that the easterly portion of said building, being 24 feet by 10 feet in dimension was completely destroyed and removed, including all plumbing and electrical work; and that certain partitions in the remaining portion of the structure (18 by 24 feet), together with the doors, sashes and almost the entire roof were removed leaving the remaining standing portion of the structure dismantled. That after the smaller building had been destroyed and razed, that portion was rebuilt with entirely new structure at the place where the old portion had been removed and the remaining portion of the old building had been *structurally altered* by changes in the supporting members of the building, including a bearing wall, certain partitions, roof, beams, girders and joists.

The court then found that after the issuance of the permit on May 19, 1937, for the single family residence above mentioned, the appellant filed an application with the planning commission for a permit to finish or complete the replacement or alteration of the old building, stating that the work remaining to be done would take but two or three days' time, and that such application of May 19, 1937, was being made pursuant to section 11 of the ordinance, and found that the planning commission took *no action upon that application except to cause the same to be filed in its records;* and that *no proceedings whatever were had upon the application.* The court further found that at no time subsequent to the 10th day of February, 1937, had there been any lawful nonconforming use of any building upon, or of the land constituting the said lot 15, but found that, notwithstanding the fact that there was no lawful nonconforming use of said lot, that the appellant without lawful authority had continued and did then continue to use the old reconstructed building for a nonconforming use, i. e., for a cafe business, contrary to the provisions of ordinance number 440; that *the nonconforming use consisted of a grocery, market and cafe business,* and that such use of said lot and the old building caused irreparable damage to the respondents and that such damage consisted in destroying the privacy, health and happiness of the respondents as property owners immediately adjacent to lot 15, and that such use caused depreciation in the value of all such properties.

Judgment was entered in favor of the respondents enjoining and restraining appellant from conducting, managing or carrying on any cafe, market, grocery store, restaurant or nonconforming business upon the property. Thereafter appellant made a motion for a new trial, which was denied. Appellant appealed from the judgment.

Appellant contends that she was at all times entitled to use the said westerly half of said lot for nonconforming use. Respondents contend that the permit issued by the building inspector was void for want of authority to issue the same and that the foregoing findings concerning construction and rebuilding of the old building and structural alterations of the remaining portion of the old building under such building permit without following the procedure outlined in ordinance number 440 established an abandonment of that building for nonconforming uses under the provisions of section 12 of the ordinance.

At the opening of the trial, appellant objected to the introduction of any evidence in the case on the ground and for the reason that the complaint did not state facts sufficient to constitute a cause of action against the appellant or a cause of action for the relief prayed for in the complaint.

[1] We need cite no authority to the effect that the enjoyment of property cannot be interfered with or limited, arbitrarily, except that the use to which one may put his property may be restricted or regulated by a city in the exercise of its police power, so far as it may be necessary to protect others from injury by such use. In re Kelso, 147 Cal. 609, 82 P. 241, 2 L.R.A.,N.S., 796, 109 Am.St.Rep. 178; Pacific Palisades Ass'n v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782. Accordingly zoning ordinance No. 440 is the yardstick by which the respective rights of the parties as to nonconforming use are to be measured or limited. This ordinance had been enacted pursuant to chapter 838 of the Laws of 1929, General Statutes. Section 10 of that chapter (page 1811) provides:

"The body creating such planning commission may, by general or special rule, provide for the reference of any other matter or class of matters to the planning commission before final action thereon by the public body or officer of said city, county, or city and county, having final authority thereon, with the provision that final action thereon shall not be taken until said planning commission has submitted its report thereon or has had reasonable time, to be fixed in said rule, to submit the report. * * *"

The ordinance expressly provides that:

"If the planning commission finds that detriment or injury to the neighborhood will not result from issuance of the permit as applied for, it may approve said permit and transmit the same, together with the complete report of its findings and recommendations, to the city council for approval and endorsement."

[2] This was not a delegation of power or authority of the city council to the planning commission as contended by appellant. City of Stockton v. Frisbie & Latta, 93 Cal. App. 277, 270 P. 270.

The rights of the commission, in so far as the permit is concerned, are contained in this provision of the ordinance. The planning commission either failed and refused to act or decided to deny the application without publishing notice of hearing. Apparently it was the view of the commission that there was no necessity of publishing notice of the hearing and holding a public hearing pursuant to such notice where the commission had determined that it would deny appellant's application for a permit.

[3] From an interpretation of chapter 838, General Statutes of 1929, section 10, supra, when construed with the ordinance adopted in pursuance thereof, it appears to us that the planning commission created by the ordinance was more or less an advisory body only, and its powers must be limited to its consideration of applications for permits, and *to recommendations* for or against the allowance of the permit. The commission is authorized by the ordinance to hold public hearings on any such application after publication of notice of hearing, to the end that property owners may have an opportunity to object to the granting of the permit on the ground that detriment or injury may result to the neighborhood.

[4] Respondents contend that the planning commission was without authority to act by reason of the fact that it failed to publish the notice of a hearing as required by the ordinance and consequently any action taken thereon by the commission was void. Based upon this conclusion, it is their contention that the planning commission therefore took no action upon the application and the city council was then without authority to grant the permit until the planning commission had either granted or denied the request. We see little merit to this claim of respondents. Respondents had actual notice of the hearing. They, together with many other property owners, appeared at the hearing in opposition to the application. Respondents are not now in a position to claim that they did not receive notice of the hearing by publication. Bradley v. Board of Zoning Adjustment, 255 Mass. 160, 150 N.E. 892, 897; Bartholomae Oil Corporation v. Seager, Cal.App., 94 P.2d 614.

[5, 6] In denying the application, there could be no detriment or injury to the property in the neighborhood involved and the only person injured by failure to publish notice of hearing and to hold a hearing pursuant to such notice would be appellant. It is apparent that this provision of the ordinance was inserted for the protection of the public. The commission having apparently denied the application, the only person injured and who could rightfully protest would be the appellant, and the application apparently having been denied, the law therefore would not thereafter require the performance of a useless act by way of publication of notice of a hearing for such purpose. After the denial by the planning commission it immediately became the right of the city council to ask for a report of the findings and recommendations of the commission. It is apparent from the record that the city council, after what in effect amounted to a denial of appellant's request for a permit, had the right to consider the matter and authorize the issuance of the permit if it was within its power to do so legally. Schofield v. City of Los Angeles, 120 Cal.App. 240, 7 P.2d 1076.

It therefore appears that the finding of the trial court in respect to the action of the planning commission was not supported by the evidence. After a denial of the application for a permit by the planning commission, the city council, by a "full, affirmative vote of all members thereof" was authorized to and had the power to grant a permit for the lawful use of and for the construction and/or remodeling of the nonconforming building which existed at the time of the passage of the ordinance, provided no structural alterations were to be made therein except those permitted under section 11 of the ordinance.

This question then presents itself. Does the evidence support the finding of the court that *structural alterations,* as defined in the ordinance, had been made? From a reading of the entire record and from an examination of the photographs in evidence, we are convinced that there was evidence that there had been a complete destruction of the 10 by 24 foot building and, as described by one witness, the floor area that was demolished and later reconstructed was 35 per cent of the total floor area of the original building, and the reconstructed roof area was 73 per cent of the entire roof. Although the evidence was conflicting, there was substantial evidence in the record to support the finding that a structural alteration had been made to the joint structure. It therefore must follow under section 12 of the ordinance that unless the structural alteration was *required by law or ordinance* or *was permitted under section 11* of the ordinance, that the nonconforming use of the building was thereby discontinued and that any future use thereof must have been in conformity with the provisions of the ordinance.

[7] Section 11 provides that where the planning commission denies the application, the city council then has authority and power to grant it only by a "full affirmative vote of all members thereof". The permit granted by the city council was by the affirmative vote of only four members thereof. One member was absent and did not vote. The city council, by a majority vote, could have, under their power, granted the permit, had the planning commission recommended it, but it seems clear to us that it was the plain intention of the city council to provide by ordinance that their power to grant a permit after a denial by the planning commission could be exercised only by a full affirmative vote of all members of the city council and not by an affirmative vote of only those members present.

In Tidewater Southern Railway Co. v. Jordan, 163 Cal. 105, 124 P. 716, 717, 41 L.R.A.,N.S., 130, Ann.Cas.1913E, 1293, involving a resolution adopted "by the unanimous vote" of plaintiff's board of directors, the court held that the unanimous vote of all directors present was sufficient, but also inferred that had the requirement been the "unanimous vote of all the directors" or the "unanimous vote of all the members of the board" a different interpretation would be necessary and cited with approval Crickenberger v. Westfield, 71 N.J.L. 467, 58 A. 1097, holding that (from syllabus): "where a statute requires the 'unanimous vote of all members of the council' to pass an ordinance, that does not mean the unanimous vote of a quorum, or of all the members present, but of all the members constituting the whole council". We are therefore convinced that no legal permit was authorized or granted by the city council under the ordinance.

[8] The complaint alleges and the proof establishes the fact that the maintenance of the grocery store and cafe in the vicinity, in violation of the ordinance under the facts and circumstances, constituted a nuisance and therefore could be abated by injunction proceedings. The facts in reference to the nuisance are strikingly similar to those set forth in Smith v. Collison, 119 Cal.App. 180, 6 P.2d 277, 278, in which case the court said:

"The erection of a store is not in and of itself a nuisance, but, depending upon the facts of the case, may become a nuisance if erected in a residential zoned area. The trial court found that the construction of the buildings would result in certain conditions heretofore mentioned. If these conditions should exist, it is fair to conclude that this would be offensive to the senses, injurious to health, an obstruction to the free use of their property, and, accordingly, result in a depreciation in value of the residence property. All of the property in the zoned area would not be so affected, but the residence property near the proposed stores certainly would be, and hence these respondents would suffer exceptional damage other than that suffered by the public generally in that particular community."

This case was cited with approval in Biber v. O'Brien, 138 Cal.App. 353, 32 P.2d 425. See, also, sec. 3479, Civ. Code. In the instant case, there is the additional reason that the ordinance also provided that any building erected contrary to the provisions of the ordinance would be a public nuisance.

[9, 10] Appellant also contends that where an ordinance specifies that the doing of a certain act is a misdemeanor, that for that reason the same cannot be enjoined because it is punishable under the penal provisions. Citing Perrin v. Mountain View Mausoleum Ass'n, 206 Cal. 669, 275 P. 787. While it is true that private persons may not resort to equity to prevent criminal acts unless the facts substantiate the claim that the person has suffered some exceptional damage to property other than that suffered by the public generally, it is the rule that even though the nuisance would constitute a private wrong, it is none the less actionable because the wrong committed also renders the guilty party liable to criminal prosecution for a common nuisance. Biber v. O'Brien, supra.

Respondents also argue and the court has found that the lot in question could not have had a nonconforming use and a conforming use at the same time; that the building of a one-family residence on the lot before applying for the permit in question constituted an abandonment of the nonconforming use (citing sec. 10c, subd. 1, of ordinance number 440, reading: "In any R-1 [single-family] residence district any lot having an area less than 5000 square feet * * * may be used as a building site for one single family dwelling. * * *"; Town of Darien v. Webb, 115 Conn. 581, 162 A. 690, and other cases.)

Many other points are raised which we deem unnecessary to determine, in view of the reasoning above expressed in reference to the legality of the permit issued by the city council.

The complaint sufficiently sets forth a cause of action. The evidence is sufficient to support the findings and the findings support the judgment.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

---

35 Cal.App.2d 434

BARD v. KENT.

Civ. 12153.

District Court of Appeal, Second District, Division 2, California.

Nov. 13, 1939.

Rehearing Denied Dec. 8, 1939.

Hearing Denied Jan. 11, 1940.

1. Gifts 🔑49(1)

Alleged telephone conversation with decedent prior to her death did not require finding, in absence of contradictory testimony, that a gift of property from decedent had resulted therefrom.

2. Appeal and error 🔑1010(1)
Executors and administrators 🔑59

Presumptively, a decedent would contradict the testimony of a living witness that during lifetime of decedent he gave away his property, and, if testimony of claimant to the property is incredible, presumption will support finding, which will not be disturbed by an appellate court, against the testimony of the claimant.

3. Gifts 🔑49(1)

In action by special administrator to recover amount alleged to have been received by defendant for use of plaintiff's decedent, presumption that decedent, if living, would contradict testimony of witness that during his lifetime decedent gave away his property, justified finding that alleged telephone conversation resulting in a gift by decedent to defendant did not occur, and presumption coupled with other evidence sustained finding that defendant had received proceeds of sale of the property for use of the decedent.

4. Trial 🔑377(2)

Whether case should be reopened prior to judgment to admit additional evidence is in trial judge's sound discretion.

5. Trial 🔑377(2)

In action by special administrator to recover sum alleged to have been received by defendant for use of decedent, denial of motion to vacate prior minute order and to reopen the case for purpose of receiving alleged newly discovered evidence, which was in fact merely cumulative of evidence received at trial that decedent had made a gift of property to defendant, was not an abuse of discretion, in absence of showing why evidence had not been produced at trial.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Ben Bard, special administrator of the estate of Ruth Roland Bard, deceased, against L. E. Kent, to recover an amount alleged to have been received by defendant for the use of plaintiff's decedent. Judgment for plaintiff, and defendant appeals.

Affirmed.

Pacht, Pelton, Warne & Black, of Los Angeles (Clore, Warne, of Los Angeles, of counsel), for appellant.

Jerome H. Kann, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover $22,403.88 alleged to have been received by defendant for the use of plaintiff's decedent Ruth Roland Bard, defendant appeals.

These are the essential facts:

Plaintiff is special administrator of the estate of Ruth Roland Bard, deceased, who died September 22, 1937. January 25, 1927, decedent advanced $38,000 to Mr. L. Lewyn and his wife and received a note and first trust deed on certain real property located in Los Angeles county (referred to by the parties as "No. 19 property") as security therefor. Subsequently defendant loaned Mr. Lewyn and his wife $10,000 secured by a note and second trust deed on the property known as "No. 19 property". In 1932 the Lewyns being in arrears in the payments due on their notes, by common understanding between them, decedent, and defendant, in lieu of a foreclosure, deeded the property described in the trust deeds to defendant who held the title to the property with the consent of decedent, ⅕ for his own account and ⅘ in trust for her.

In September of 1937 No. 19 property was sold for $37,500 and at the same time in order to clear the title to the property decedent executed a "'Request for Reconveyance", which was delivered to the trustee, who in turn executed a reconveyance which was duly recorded September 3, 1937. Subsequently defendant received the purchase price of the property, converted it into certificates of deposit in his own favor and placed them in a safety deposit box. None of the money was ever paid to decedent or plaintiff.

Subsequent to the trial court's entering a minute order giving judgment in favor of plaintiff, defendant made a motion to vacate the order and reopen the case for further evidence.

Defendant relies for reversal of the judgment on these propositions:

First: There was not substantial evidence to sustain the trial court's finding of fact reading as follows:

"That between the 4th day of September, 1937, and the 15th day of November, 1937, and thereafter from said last named date to the 26th day of April, 1938, as set forth in plaintiff's Complaint and Amended and Supplemental Complaint, in the County of Los Angeles, State of California, the said defendant L. E. Kent received the sum of $22,403.88 for the use of Ruth Roland Bard, deceased."

Second: The trial court committed prejudicial error in refusing to vacate its minute order granting judgment in favor of plantiff and in refusing to reopen the case for further evidence.

The first proposition is untenable. From an examination of the record it appears that there is substantial evidence from defendant's own testimony and documentary evidence to support each and every fact set forth above.

Defendant testified that September 1, 1937, decedent telephoned him and he described the telephone conversation as follows: "The call came through the switchboard, and she said, 'Hello'. She said, 'Did Ben give you the paper?' I said, 'Yes'. 'I want you to have my interest in No. 19. Don't say anything now. Goodbye.'"

[1, 2] His testimony on this point was corroborated by Miss Barnette, his secretary, who testified that in accordance with defendant's instructions she had listened in on the alleged telephone conversation between defendant and decedent. Defendant urges that, since defendant's testimony as to his conversation with decedent was not directly contradicted, the trial court was bound to find as a fact that the alleged telephone conversation had in fact taken place and that as a result a gift to him from decedent of the proceeds from No. 19 property resulted. Such, however, is not the law. The rule is settled in this state that there is a presumption that a decedent would contradict the testimony of a living witness that during his lifetime he gave away his property, and that, if the trial court deems the testimony of the claimant to the property incredible, the aforementioned presumption will support a finding against the testimony of the claimant, which finding will not be disturbed by an appellate court. Freese v. Odd Fellows' Sav. Bank, 136 Cal. 662, 664, 69 P. 493, 494.

Mr. Chief Justice Beatty in Freese v. Odd Fellows' Sav. Bank, supra, speaking for our Supreme Court, says: "It will not do to say that, when a man is dead, his property must be awarded to any one who can testify, without contradicting himself, that it was given to him by the mere oral declaration of the decedent during his lifetime. In such case there is no possibility of direct contradiction. The lips of the alleged donor are sealed; but there is a presumption which takes the place of his testimony, for the protection of his legal representatives. It is not in the ordinary course of human affairs for men to dispose of their property in that way, and when such a disposition is asserted by the claimant, against the representatives of a dead man, a court is certainly at liberty to refuse credence to his statement, however consistent with itself it may be. And when the trial court has rejected his testimony—necessarily upon the ground that it is incredible—it would be a startling innovation for this court to practically make an affirmative finding of a gift by reversing the decision of the trial court, and remanding the cause with directions to find in favor of the alleged donee if the testimony on a new trial should be substantially the same. The credibility of witnesses is for the trial court, not for us, and a presumption is sufficient to sustain a finding against the positive evidence of a party upon whom is cast the burden of proof."

See, also, Davis v. Judson, 159 Cal. 121, 128, 113 P. 147; Roberts v. Roberts, 168 Cal. 307, 308, 142 P. 1080, Ann.Cas.1916A, 886; Donovan v. Kemper, 26 Cal.App. 352, 355, 146 P. 1044.

[3] In addition to the foregoing presumption, there was uncontradicted testimony that decedent had stated to her husband that she was agreeing to the sale of the property for $37,500 and taking a loss, "because in case anything happens to me, you will have some money for the conduct of my estate", and that on another occasion referring to the same property she had stated to a friend with reference to the sale of the property, "It is a shame that I have to take such a loss, but that is what comes from helping out a friend."

Applying the presumption of law set forth above relative to testimony of a conversation with a decedent regarding an alleged gift of decedent's property to a claimant to the evidence heretofore detailed, the trial judge was thoroughly justified in finding that the alleged conversation of September 1, 1937, between decedent and defendant did not occur. This being true, it follows there was substantial evidence from the facts set forth above to sustain the questioned finding of fact of the trial court.

[4, 5] The second proposition is likewise untenable. The alleged newly discovered evidence upon which defendant based his motion to vacate the prior minute order and reopen the case for further evidence was merely cumulative of evidence received at the trial that decedent had made a gift of her interest in No. 19 property to defendant, and failed to show any reason why such evidence had not been produced at the time of the trial. It needs no citation of authority for the proposition that it rests in the sound discretion of the trial judge whether to grant or deny a motion to reopen a case prior to judgment for the purpose of receiving additional evidence. In the instant case we find no abuse of the trial court's discretion in its ruling.

For the foregoing reasons the judgment is affirmed.

I concur: WOOD, Acting P. J.

---

35 Cal.App.2d 428

DAVIS v. STATE BOARD OF OPTOMETRY et al.

Civ. 11875.

District Court of Appeal, Second District, Division 1, California.

Nov. 10, 1939.

Hearing Denied Jan. 8, 1940.

1. Physicians and surgeons ⚷11(3)

Although the law confers upon the State Board of Optometry jurisdiction to determine questions likely to arise as result of statute relating to revocation of certificates of optometrists for unprofessional conduct and although the evidence in the record will support conclusions reached by the board, the court has the power to hear and determine the same questions. St.1913, p. 1097, as amended; St.1933, p. 849, § 11, subd. 3.

2. Mandamus ⚷174

Although parties to mandamus proceeding to require State Board of Optometry to restore optometrist's license, which had been revoked on ground of unprofessional conduct, agreed to submit issues upon evidence adduced at hearing before the board, the trial court was bound to determine questions of fact involved and to pass judgment upon value and effect of the evidence presented, and court's failure to make necessary findings required reversal where record revealed that findings were not waived. St. 1913, p. 1097, as amended; St.1933, p. 849, § 11, subd. 3; Code Civ.Proc. § 632.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Proceeding by Harry Davis against the State Board of Optometry of the State of California and others, for writ of mandamus to compel defendants to restore the plaintiff's license to practice optometry which was revoked by the defendants. From a judgment granting the writ and from an order denying a new trial, defendants appeal.

Judgment reversed and cause remanded for new trial, and appeal from order denying new trial dismissed.

U. S. Webb, Atty. Gen., and Bayrad Rhone, Deputy Atty. Gen., for appellants.

Morris Abraham and Frank S. Hutton, both of Los Angeles, for respondent.

DORAN, Justice.

In a petition for a writ of mandate filed in the superior court the petitioner, Harry Davis, sought a writ to compel the defendants, the State Board of Optometry of the State of California, and three members thereof, to restore his license which had been revoked as the result of a hearing conducted under the provisions of the Optometry Law, Stats. 1913, chap. 598, p. 1097, as amended, Act 5668 of Deering's General Laws of California. Issues being joined, the matter was submitted for decision in the superior court upon the pleadings, which contained the complaint and decision of the board, as well as the reporter's transcript of all of the testimony taken at the hearing, and all exhibits introduced. No other testimony of any nature was presented.

Defendants are appealing from the judgment granting the writ, and from the order denying their motion for a new trial.

The record reveals that a complaint was filed with the board by an investigator of the State Board of Optometry, charging the respondent herein, a registered optometrist, with unprofessional conduct as defined in subdivision 3 of section 11 of the Optometry Law, as amended by St.1933, p. 849. The first charge accused respondent with advertising in various newspapers in which untruthful statements were alleged to have been made in the advertising of optical business or treatment. The second charge accused respondent of obtaining from certain named persons various designated amounts, by reason of the untrue statements appearing in the advertisements. The board found that the first charge was true, and that a portion of the second charge was true, and thereupon ordered that the certificate of registration theretofore issued to respondent be revoked.

The advertisements which, it was charged, were placed by respondent in the various newspapers, related to the sale of white, single vision lenses, including examination and rimless mounting or frames, for $7.50. A so-called "typical" advertisement, which appeared in a Los Angeles newspaper on April 18, 1937, was introduced into evidence at the hearing and read as follows:

"It is *not* necessary *to pay* more for your *glasses*

"These Beautiful Rimless *glasses* Complete $7.50

"This price includes expert examination by eye-sight specialist, any single-vision lenses your eyes require and choice white gold filled rimless mounting or frame.

"Formerly *Davis Optical Co.* Now *Ideal Optical Co.*

"Los Angeles 551 Broadway

"Long Beach 144 Pine Ave.

"Alhambra Main and Garfield at Sontag Drug Store."

It appears that there is in existence a corporation known as the Davis Optical Company (hereinafter referred to as the Davis company), owned by the respondent and his wife. This corporation, according to the testimony of respondent, owns all of the equipment of the Ideal Optical Company (hereinafter referred to as the Ideal company), at the three stores listed in the advertisement hereinbefore quoted. The Davis company had been in the business of manufacturing and dispensing glasses prior to the formation, in April of 1937, of the Ideal company. With the formation of the latter company no tangible property was transferred by the Davis company, but "just the right to do business". The Davis Optical Company and the Ideal Optical Company shared offices on the same floor and at the same address in Los Angeles. The Davis company leased the equipment, and subleased the premises at the three stores, to the Ideal company for 20 per cent of the gross retail business done. However, none of this 20 per cent for the rental had been paid from the time the Ideal company was formed until the petitioner testified before the board on June 25, 1937. Appellants argue that the evidence reveals the Davis Optical Company and the Ideal Optical Company to be merely the alter ego of respondent.

Briefly, the evidence of alleged misconduct on the part of petitioner was based upon the testimony of one William Meikle, an United States customs inspector at San Pedro, California, a disinterested witness who answered the advertisement, as well as the testimony of four individuals who visited the business establishments of petitioner, in part in response to the advertisement. The respondent disputed the effect of the evidence and denied any connection with the Ideal Optical Company. Thus upon conflicting evidence the board found, in effect, that it was true as alleged in the complaint that Harry Davis was guilty of unprofessional conduct in that he had advertised, or caused to be advertised, in various newspapers, "optical business and treatment in which untruthful statements were made in each and every one of said advertisements, in that in each of said advertisements said Harry Davis offered for sale complete glasses containing any white single vision lenses and including frames and examinations for $7.50, and also containing the statement 'It is not necessary to pay more for your glasses'; that said statement was untrue in that the said Harry Davis did consistently fail, refuse and neglect to sell or furnish complete glasses containing white single vision lenses and including frames and examinations for the sum of $7.50, to persons answering said advertisements."

Appellants contend on appeal that the Ideal Optical Company is the alter ego of the respondent herein; that the evidence is sufficient to warrant the Board of Optometry in finding that the petitioner was guilty of unprofessional conduct; and that the trial court erred in failing to make findings of fact.

With regard to the last-mentioned contention, respondent urges that, "The sole question before the trial court was: Was the record upon which the Optometry Board made its findings and order, legally sufficient to justify the holding of the petitioner guilty of unprofessional conduct? The judgment of the court was that the evidence before the Board was legally insufficient to justify an order of revocation of the license of the petitioner and it accordingly ordered a peremptory writ to issue. There was no other order before the court. The issue before the court was a legal issue and not a factual one."

The judgment of the trial court, in part, was as follows:

"* * * and evidence having been introduced and argument on the facts as well as the law having been made by counsel representing each of the above entitled parties, and the cause having been submitted to the Court for decision, and good cause appearing therefor,

"It is hereby ordered, adjudged and decreed that judgment be rendered for the petitioner and against the" defendants "as follows: 1. 'That a peremptory writ of mandate issue in favor of the petitioner and against the' defendants 'and each of them as follows * * *.'"

The writ ordered the board to rescind and set aside its order, and to restore to petitioner his certificate to practice optometry.

It should be noted, as pointed out by appellants, that the court made no findings of fact or conclusions of law. It is evident, however, from the judgment as recited above, that the trial court after reviewing the transcript of the evidence adduced at the hearing before the board substituted its judgment and discretion for the judgment and discretion of the board.

Section 11 of the Optometry Act (Act 5668 of Deering's Genl. Laws of Cal.) reads as follows:

"*Grounds for revoking certificates. Unprofessional conduct.* The certificate of registration of any person registered as provided for in this act, may be revoked or suspended for a fixed period by the said Board of Optometry for any of the following causes: * * *

"3. For unprofessional conduct * *. Unprofessional conduct shall mean * * * the obtaining of any fee by fraud or misrepresentation; * * * the advertising of optical business or treatment or advice in which untruthful, improbable or impossible statements are made."

[1] Although the law unequivocally confers upon the board jurisdiction to determine the questions likely to arise as a result of the above-quoted provisions of the act, and although there may have been sufficient evidence in the record to support the conclusions reached by the board, nevertheless in the circumstances the court has the power to hear and determine the same questions. Drummey v. State Board of Funeral Directors and Embalmers, 13 Cal. 2d 75, 87 P.2d 848.

In the Drummey case, which presented an analogous situation, the court declared:

"After considering the various possibilities, we can see no escape from the conclusion that in such a proceeding the court to which the application for mandate is made must weigh the evidence, and exercise its independent judgment on the facts, as well as on the law, if the complaining party is to be accorded his constitutional rights under the state and federal constitutions. * * *

"We think the limitations on the rule that the court must exercise its independent judgment on the facts in such cases suggested by the United States Supreme Court in the St. Joseph Stock Yards case

[St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033] are sound. The findings of a board where formal hearings are held should and do come before the courts with a strong presumption in their favor based primarily on the disputable presumption contained in section 1963, subsection 15 of the Code of Civil Procedure 'That official duty has been regularly performed'. Obviously, considerable weight should be given to the findings of experienced administrative bodies made after a full and formal hearing, especially in cases involving technical and scientific evidence. Another limitation on the rule also suggests itself. Normally applications for such writs should be filed in the trial courts, whose normal function it is to determine and ascertain controverted issues of fact." Drummey v. State Board of Funeral Directors and Embalmers, supra, 13 Cal.2d at pages 84, 86, 87 P.2d at page 853.

It is respondent's contention that: "The only material questions raised by the answer were questions of law, and the case was tried upon the theory that only a question of law was at issue. If the respondent and the appellant Board had entered into a stipulation that the facts upon which petitioner's claim rested were as set forth in the transcript of the proceedings before the Board, and that the case should be submitted on the record so made, we would have had a case submitted upon a stipulation of facts, and in that case no findings would have been necessary." Wixom v. Davis, 198 Cal. 641, 246 P. 1041, and Gregory v. Gregory, 102 Cal. 50, 36 P. 364, are relied upon in support of this contention.

It is further contended by respondent that: "Even if it can be said that there was no agreed statement of facts, it nevertheless clearly appears that there was no dispute in the facts, and that being so, it left to the court the sole function of drawing its conclusions of law therefrom, and findings were therefore not necessary. We before pointed out that the only duty resting upon the trial court was to determine from the agreed record whether or not the Optometry Board's action was correct and within its jurisdiction. The trial court being of the opinion, upon the undisputed facts, that the Optometry Board exceeded its jurisdiction and that there was not sufficient or any evidence to sustain its findings, ordered the issuance of the writ. This was proper."

[2] Although the parties apparently agreed to submit the issues upon the evidence adduced at the hearing before the board, nevertheless, under the circumstances, the court was bound to determine the questions of fact involved and necessarily to pass judgment upon the value and effect of the evidence presented. Findings, therefore, were necessary, indeed indispensable unless waived. The record reveals that the findings were not waived. The parties submitted the issues upon an agreed record of the evidence; it was the trial court's duty to find as to the effect of such evidence and in that connection make the necessary findings. Sec. 632, Code Civ. Proc.; Williams v. Wren, 88 Cal.App. 607, 263 P. 1038; Black v. Board of Police Comm'rs, 17 Cal.App. 310, 313, 119 P. 674; Taylor v. Taylor, 192 Cal. 71, 80, 218 P. 756, 51 A.L.R. 1074. This the trial court failed to do, which was error.

For the last-mentioned reason the judgment is reversed and the cause remanded for a new trial. The appeal from the order denying a new trial is dismissed.

We concur: YORK, P. J.; WHITE, J.

35 Cal.App.2d 422

LANTIN v. BISCAILUZ, Sheriff.

Civ. 12476.

District Court of Appeal, Second District, Division 1, California.

Nov. 10, 1939.

1. Execution 🔑132

Where levy is sought to be made on debt under statute, proper procedure is by service of copy of writ on defendant in original action, who is person owing the debt on which execution is sought. Code Civ.Proc. § 542, subd. 6.

2. Execution 🔑47

Where defendant obtained judgment against plaintiff for costs on appeal, and judgment for plaintiff against codefendant was affirmed, obligation of codefendant evidenced by judgment recovered against him by plaintiff was a "debt" subject to execution by defendant under judgment for costs within statute providing for levy of execution upon "debts" and credits and other personal property. Code Civ.Proc. § 542, subd. 6.

[Ed. Note.—For other definitions of "Debt," see Words & Phrases.]

3. Execution 🔑132

Where defendant obtained judgment against plaintiff for costs and judgment for plaintiff against codefendant was affirmed and execution was issued on judgment for costs, the levying officer, to effect levy under writ of execution on the debt owing by the codefendant to the plaintiff, was required to leave copy of writ with codefendant who was person owing such debt, with notice that the debts owing by him to the plaintiff were attached pursuant to the writ. Code Civ.Proc. §§ 541, 542, 688.

4. Execution 🔑132

Where defendant obtained judgment against plaintiff for costs on appeal and judgment in favor of plaintiff against codefendant was affirmed, levy of execution on judgment in favor of plaintiff against codefendant to satisfy judgment for costs was valid and effectual, where codefendant was served with written notice of proposed sale of plaintiff's interest in such judgment on date therein fixed and sheriff published notice of proposed sale by public office. Code Civ.Proc. §§ 541, 542, 688.

5. Mandamus 🔑55

Where defendant obtained judgment against plaintiff for costs on appeal and judgment in favor of plaintiff against codefendant was affirmed and execution was regularly levied on plaintiff's interest in judgment against codefendant, assignee of defendant's judgment for costs was entitled to writ of mandate to compel sheriff to proceed with sale of plaintiff's interest in judgment under writ of execution. Code Civ.Proc. §§ 541, 542, 688.

Original proceeding by Herbert L. Lantin against Eugene W. Biscailuz, sheriff of the county of Los Angeles, state of California, for a writ of mandate seeking to compel the sheriff to proceed under writ of execution with the sale of a judgment. On demurrer to petition.

Demurrer overruled and peremptory writ issued.

Maurice Rose, of Los Angeles, for petitioner.

J. H. O'Connor, County Counsel and J. F. Moroney, Deputy County Counsel, both of Los Angeles, for respondent.

WHITE, Justice.

This is an original proceeding for a writ of mandate seeking to compel the Sheriff of Los Angeles county to proceed under a writ of execution with the sale of all the right, title and interest of certain judgment debtors in and to a debt owing to them from an execution debtor. The admitted facts are that in an action in the superior court of Los Angeles county one Benjamin Fink obtained a judgment for $75,000 plus interest and costs against William Weisman and Joseph Toplitzky. On appeal to this court the judgment was affirmed as to the defendant Weisman, but was reversed as to the defendant Toplitzky, by reason of which said Toplitzky recovered a judgment against Fink for the costs of the appeal in the sum of $819.60, which judgment was duly entered in the records of the superior court of Los Angeles county. Subsequently, on or about October 23, 1936, said judgment for appeal costs was assigned to the petitioner herein by the administrator of the estate of Joseph Toplitzky, deceased.

Under date of September 6, 1939, the superior court of Los Angeles county made its order in the aforesaid action directing that execution issue for the enforcement of the judgment rendered in favor of the defendant Toplitzky against the plaintiff, Fink, for appeal costs. For reasons not here material the execution was also directed against the property of William Austin Callahan and Jamie Morgan Montague, as well as against said Benjamin Fink. On September 13 petitioner herein caused to be delivered to respondent sheriff the original writ of execution, together with a copy thereof and instructions signed by petitioner's attorney whereby respondent sheriff was instructed by virtue of said writ of execution to levy on the defendant William Weisman and sell the personal property in such instructions mentioned not capable of manual delivery, to-wit, "all debts, credits, and other personal property not capable of manual delivery, owed by William Weisman to the plaintiff Benjamin Fink, and to William Austin Callahan and Jamie Morgan Montague, or to any of them", and "particularly all debts that William Weisman owes to said Benjamin Fink, William Austin Callahan and

Jamie Morgan Montague, or to any of them, under or by reason of that certain judgment for the sum of $75,000.00, with interest, recovered by said Benjamin Fink against said William Weisman".

Following such levy William Weisman furnished respondent sheriff with a written statement setting forth that no part of said judgment had been paid and that the entire amount of the indebtedness of said Weisman on the judgment was still due and owing from Weisman to the owner of said judgment. It is conceded that the sheriff has been unable to collect any of the indebtedness due from the execution debtor Weisman to the holders of the judgment upon which the aforesaid execution was levied. Petitioner thereupon requested the defendant sheriff to proceed to sell the indebtedness of the execution debtor Weisman to petitioner's judgment debtors, and particularly all right, title and interest of said judgment debtors in the indebtedness of said execution debtor under the aforesaid judgment against such execution debtor, William Weisman. Thereafter respondent sheriff duly served the execution debtor Weisman with a written notice of the proposed sale of the judgment debtor's interest in said judgment upon a date therein fixed, and respondent sheriff further published notice of said proposed sale, the same to be by public auction. On the date to which the sale was finally continued respondent sheriff notified petitioner's attorney that he refused to proceed with such sale, upon the ground that he was without power to sell the property which he had levied upon as aforesaid, and thereupon adjourned said proposed sale from time to time until the same is now set for next Monday, November 13, at which time it is conceded respondent sheriff will refuse, unless directed so to do by appropriate writ, to proceed with such sale.

Respondent's only return to the alternative writ heretofore issued is by way of demurrer to the petition therefor upon the grounds that the same does not state facts sufficient to constitute grounds for the issuance of a writ of mandate, and further, does not state facts sufficient to constitute a cause of action.

Respondent contends that while there is authority for the sale upon execution of a cause of action either before or after the same has been reduced to judgment (Meserve v. Superior Court, 2 Cal.App.2d 468, 38 P.2d 453; Everts v. Will S. Fawcett Co., 24 Cal.App.2d 213, 74 P.2d 815; Sunset Realty Co. v. Dadmun, Cal.Super., 88 P.2d 947), there is nevertheless no authority in this state for the sale upon execution of a judgment as such, conceding, however, that a *cause of action* which has been merged into a *judgment* may be sold upon execution provided a levy is first made in the manner authorized by Meserve v. Superior Court, supra, and Everts v. Will S. Fawcett Co., supra. Respondent further asserts that in order to levy upon a cause of action, either before or after the same has been reduced to a judgment, service of the writ must be made upon the *plaintiff* in the action sought to be levied upon, since he is the person in control of the property in question, and that service cannot be made, as was done in the instant case, upon Weisman, who was the defendant in the original action of Fink v. Weisman et al. Respondent claims that because the garnisheed debt has not been delivered to the sheriff there is no authority in law for a sale upon execution, citing Brainard v. Rogers, 74 Cal.App. 247, 239 P. 1095, and Sunset Realty Co. v. Dadmun, supra. Respondent sheriff's position may therefore be epitomized as a claim that in the case before us there was no valid levy of execution because service of the writ was never made upon Benjamin Fink, plaintiff in the original action, and that the service made was merely by way of *garnishment* upon the defendants in such action. It may be noted, however, that it appears from the allegations of the petition that Benjamin Fink resides outside of this state, and that a notice of the proposed sale under execution was personally served upon him by the sheriff of Ramsey county, Minnesota, in St. Paul, Minnesota, and that notice also was served upon his attorney in Los Angeles.

With reference to property liable to execution, section 688 of the Code of Civil Procedure provides in part as follows: "All goods, * * * or other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution."

With reference to the manner in which execution is to be levied, we find the same section continuing: "Shares and interests in any corporation or company, and *debts* and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be levied upon, * * * *in like manner as like property may be attached* * * *."

Section 541 of the Code of Civil Procedure provides that all *debts* due a defendant and not exempt from execution may be attached.

Following the direction contained in the sentence last above quoted from section 688 of the Code of Civil Procedure, we turn to section 542 of the Code of Civil Procedure for guidance as to the manner in which property is to be attached, and therein we find with reference to the procedure prescribed for the sheriff in levying the writ subdivision 6 of section 542, reading in part as follows: "*Debts* and credits and other personal property, not capable of manual delivery must be attached by leaving with the persons *owing* such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent * * * a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ."

[1] It seems plain that in cases such as the one before us, where the levy is sought to be made on *debts,* that the proper procedure was that followed by the sheriff herein when he served a copy of the writ upon Mr. Weisman, defendant in the original action, who was the person *owing* the debt upon which execution was sought. It seems plain to us that "debts" could in no case be validly "seized" from those to whom they are due, but can be seized only by taking them from those from whom and not to whom they are owing. The levy having been legally and lawfully made, section 691 of the Code of Civil Procedure dictates the subsequent duty reposing upon the levying officer by providing that the officer "must execute the writ against the property of the judgment debtor, by * * * collecting *or* selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess of the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court". There would seem to be no question but that a debt may be sold on execution before it has been adjudicated, and that being so, no good reason appears why such debt should not be salable on execution after it has been adjudicated by a record judgment.

We are unable to perceive any conflict between our holding here and the cases of Dore v. Dougherty, 72 Cal. 232, 13 P. 621, 1 Am.St.Rep. 48; McBride v. Fallon, 65 Cal. 301, 4 P. 17, 18, or Meserve v. Superior Court, supra. In none of these cases is it expressly declared that the debt of which the judgment is the evidence may not be reached by execution. The tenor of these decisions might well be summarized in the following language from McBride v. Fallon, supra: "We are clearly of the opinion, however, that a *judgment* cannot, in any case, be levied on and sold under execution as the judgment in this case was." (Italics added.) We are not in accord with the views expressed in the case of Sunset Realty Co. v. Dadmun, supra, so far as the same holds that unless the debt is voluntarily paid by the execution debtor to the levying officer as "plaintiff's agent" upon a writ of execution such as in the case at bar, that the officer has no further duty respecting it and has no power to sell such a debt.

[2-5] The obligation of William Weisman, the execution debtor herein, evidenced by the judgment recovered against him by the petitioner's judgment debtors, was a "debt" within the meaning of section 542, subdivision 6, of the Code of Civil Procedure. To effect a levy under the writ of execution on said "debt", the levying officer had but one course of procedure, that prescribed in section 542, namely, to leave as he did a copy of said writ with the execution debtor, William Weisman, the person "owing" such debt, with a notice that the debts "owing by him" to the petitioner's judgment debtors were attached pursuant to said writ. Respondent sheriff having duly followed the prescribed procedure, the levy on said "debt" was valid and effectual, and by reason thereof certain rights enured to the petitioner herein attendant with corresponding duties on the sheriff with respect to the collection or sale of said debt.

The demurrer to the petition is overruled; and it is ordered that the peremptory writ issue as prayed.

We concur: YORK, P. J.; DORAN, J.

35 Cal.App.2d 416

MUNDT v. CONNECTICUT GENERAL LIFE INS. CO. et al.

Civ. 10739.

District Court of Appeal, First District, Division 1, California.

Nov. 10, 1939.

1. Husband and wife ⚷279(3)

A property settlement agreement entered into by husband and wife after their separation and during pendency of divorce action, providing that property thereafter acquired by either party should remain the sole and separate property of such party, did not bar wife from asserting community claim to half the proceeds of life policy naming mother as beneficiary without wife's consent, and taken out after reconciliation of husband and wife, and given vitality by premiums paid with money earned by husband after reconciliation, notwithstanding that property divided pursuant to agreement was not restored after reconciliation.

2. Husband and wife ⚷279(3)

A reconciliation of husband and wife, followed by resumption of marital relations, cancels executory provisions of property settlement agreement giving property thereafter acquired by husband or wife to the party acquiring such property as such party's sole and separate property.

3. Husband and wife ⚷279(3)

The oral agreement of husband and wife resuming marital relations after their reconciliation, to set aside and annul written property settlement agreement entered into after their separation and during pendency of divorce action and providing that property thereafter acquired by either party should remain such party's sole and separate property, was an "executed oral agreement" and was a sufficient cancellation of settlement agreement. Civ.Code, § 1698.

4. Appeal and error ⚷996

Where inferences fairly deducible from uncontradicted evidence are such that different conclusions might rationally be drawn therefrom by men equally sensible and impartial, conclusion reached by jury, or court sitting as such, should be deemed final and not disturbed on appeal.

5. Interpleader ⚷29

Evidence warranted wife's recovery of one-half of proceeds of husband's life policy which was given vitality by premiums paid with money earned by husband during marriage, and recovery of remaining one-half of proceeds by husband's mother who was named as beneficiary without wife's consent, on ground that there was no consideration for designation of mother as beneficiary. Civ.Code, § 172.

6. Husband and wife ⚷273(1)

A wife who did not consent to naming of husband's mother as beneficiary of husband's life policy which was given vitality by monthly premiums of $3 paid with money earned by husband during the marriage, could recover one-half of proceeds of $2,000 policy, notwithstanding that wife inherited community property in excess of $5,000.

7. Husband and wife ⚷249, 273(1)

Where premiums on policy issued on life of husband after coverture are paid entirely from community funds, policy is community asset and nonconsenting wife can recover undivided one-half thereof without regard to amount or condition of estate remaining in husband's hands at the time of his death and without regard to disproportionate size of premium when compared with face of policy.

* * *

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action on life policy by Dorothea Mundt against the Connecticut General Life Insurance Company, and Eleanor Wrenn, individually and as administratix of the estate of Martin C. Wrenn, deceased. Eleanor Wrenn filed a cross-complaint. From the judgment, Dorothea Mundt appeals.

Affirmed.

Pierce & Sherwin, of Oakland, for appellant.

Cecil N. Lavers, of Albany, for respondents.

GOODELL, Justice pro tem.

In September, 1936, Martin C. Wrenn took out a $2,000 policy of insurance on his life in the Connecticut General Life Insurance Company, designating his mother, the appellant, as beneficiary. In November, 1936, he died, and the beneficiary brought this action on the policy, joining as defendants the company and the insured's widow, individually and as administratrix of his estate. The widow filed a cross-complaint, claiming half the insurance money by virtue of her community right, the premiums having been paid out of the insured's earnings. The insurance company paid the $2,000 into court, and, on stipulation, half thereof was paid to the beneficiary. From a judgment awarding the remaining $1,000 to the widow the beneficiary has appealed.

Martin C. and Eleanor Wrenn were married in 1920 and continued to be husband and wife until his death. From August, 1932, until the entry of an interlocutory decree in November, 1932, a suit for divorce was pending between them, and while they were separated they entered into a property settlement. Pursuant to this agreement some $3,500 in bank deposits and certain personal effects were forthwith put into the wife's name, and the real property, together with some personal property, was put into the husband's name. A few days after the interlocutory judgment was entered the spouses became reconciled and resumed marital relations.

[1-3] As one of the grounds for her claim that all the insurance money should go to her, the appellant invokes the provision in the agreement that all property thereafter acquired by either party should be and forever remain the sole and separate property of the party acquiring or receiving it. Appellant argues, first, that this provision remained binding and effective up to the time of her son's death, and that it bars his widow from asserting her community claim to half the insurance money, and, second "that the evidence which proved the reconciliation at the same time disproved the intent of the parties to restore the property to its community status". True, the evidence shows that when the parties became reconciled nothing was done to restore the property (divided pursuant to the agreement) to its former position, but the present litigation is not concerned with that property. The policy in question was given vitality by premiums paid with money earned by the husband almost four years after the reconciliation, so it would seem that the executed parts of the agreement have no particular bearing on the present controversy. The provisions with respect to after-acquired property were, of course, executory. That a reconciliation, followed by the resumption of marital relations, operates to cancel the executory provisions of such a contract seems to be settled. 9 Cal.Jur. 827; Sargent v. Sargent, 106 Cal. 541, 546, 39 P. 931; Jones v. Lamont, 118 Cal. 499, 502, 50 P. 766, 62 Am.St.Rep. 251; Estate of Martin, 166 Cal. 399, 402, 137 P. 2; Estate of Boeson, 201 Cal. 36, 42, 255 P. 800. See particularly Wells v. Stout, 9 Cal. 479, 498, where the reason for the rule is given as follows: "The object of the deed is to provide for the maintenance of the wife whilst living separately from her husband; but, if reconciliation and cohabitation take place, her maintenance being obligatory upon him, the consideration of the deed fails." The trial court in the instant case found that the "agreement was entered into in contemplation of divorce to be procured and a separation to be effected" and further, that no divorce was ever granted, but that there was a reconciliation and resumption of cohabitation, and that the parties had orally annulled the agreement. There is ample evidence to support these findings. It is claimed by the appellant that the trial court, in finding as it did, disregarded section 1698, Civil Code. This contention is pointedly answered in the case of Brown v. Brown, 170 Cal. 1, 7, 147 P. 1168, 1171, as follows: "With regard to the separation agreement made by Brown and wife in 1906, which purported to release her rights in the community and to declare subsequently acquired property the separate property of the person acquiring it, and which it is claimed bars the present action of plaintiff, we need only say that the findings declare that some four months after its execution the parties agreed to become, and were reconciled, that they thenceforth for several months lived and cohabited together as husband and wife; and that, in pursuance of the agreement to so live, they further orally agreed to, and did, set aside and annul said agreement. This was an executed oral agreement, and it was a sufficient cancellation of the previous written agreement of separation. Civ.Code, § 1698; Pearsall v. Henry, 153 Cal. [314] 325, 95 P. 154, 159." In the case at bar, however, unlike the Brown case, the resumption of marital relations continued until the husband's death.

The case of Estate of Bengochea, 94 Cal.App. 647, 651, 271 P. 760, 761, cited by appellant, is not at all in point. There the spouses had become reconciled shortly before the husband's death, it is true, but the wife had "sold her community interest to a third person for a valuable consideration, which admittedly was adequate, and * * * she did not thereafter seek to rescind * * * ." Moreover, the court was there dealing with an executed agreement.; here, as said above, the trial court was concerned only with the executory part of the agreement in question.

[4, 5] Independently of the position just discussed, the appellant contends that there was a valuable consideration (see sec. 172, Civ.Code) moving from her to her son to support the insurance contract in her favor. The court found, however, "that the designation by said deceased of the plaintiff Dorothea Mundt as the beneficiary in said policy of insurance was made without the knowledge or written consent of said Eleanor Wrenn, and was not made for a valuable consideration; that the proceeds of said life insurance policy to the extent of $2,000 are community property". It is claimed that this finding lacks evidentiary support.

The uncontradicted facts are that commencing about the time of the separation and continuing for about three years, the appellant, who lived close to the place where her son worked, served him with breakfast and put up his lunch on each working day. She also did some laundering and mending for him and on a few occasions—presumably during the separation—had him for Sunday dinners. The son at first paid her $1 a week, and later $2 a week. The appellant testified that she at first "kind of refused" to accept the money and the inference may fairly be drawn from the record that she did not consider it much of an obligation on the son's part. She did testify that "I could not board a stranger for that money, I will tell you that" and, further, that he promised to make it up to her some other way, and did not want to owe her anything. He told her two or three weeks before he died of the new policy he had taken out and said that he could not pay her enough for what she had done for him. Without summarizing all the testimony on this subject, it suffices to say that there is ample evidence to support the court's finding. True, the evidence is uncontradicted but the rule is settled that even in such case "if the inferences fairly deducible therefrom are such that different conclusions might rationally be drawn therefrom by men equally sensible and impartial, the conclusion reached by the jury, or the court sitting as such, should be deemed final and not disturbed on appeal. * * * In such case the decision of the trial court * * * is as conclusive as where the conflict arises directly from the evidence." 2 Cal.Jur. 934, sec. 549, and cases cited. Counsel for respondent aptly says: "The trial court was justified in finding either that the furnishing of the meals was gratuitous, and the giving of money was likewise gratuitous; or that such meals as were furnished were fully paid for." Indeed, one part of appellant's own testimony would, in itself, justify this inference, where she said "He paid me one dollar a week in the beginning and after he paid two dollars and I didn't want no more." Again "* * * but later he laid me two dollars on the table and I said, 'That is plenty, I do not want to rob you; you have no work for years' and he said 'All right, Ma, but I will make it up to you some other way."

From the appellant's testimony the trial court might well have concluded that she did not consider the $2 a week a contractual arrangement at all, but rather a token of appreciation, or, on the other hand, that she did consider it a business matter and that she was fully compensated. It was, after all, a question of fact (Estate of Thomson, 165 Cal. 290, 296, 131 P. 1045) for the trial court and we cannot disturb it where it is a question upon which reasonable minds might differ.

It is claimed that Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 238 P. 1034, is controlling. The answer is that in the case at bar the court found that there was no consideration for the designation of the mother as the beneficiary. In the cited case, on the other hand, 196 Cal. at page 507, 238 P. at page 1038, after discussing section 172 of the Civil Code and the rule that premiums paid out of community funds impress the policy with a community character, the court says: "This principle, however, has no application to the facts of the instant case, inasmuch as there is evidence in the record tending to support the implied finding of the trial court that the designation of the respondent as beneficiary of the proceeds of the policy was made by the assured for a valuable consideration."

[6, 7] The last point urged by the appellant is stated by her counsel as follows: "May a husband whose wife upon his death inherits community property in excess of $5,000 make a valid gift to his mother of a $2,000 insurance policy which requires monthly premiums of $3.00 to be deducted from his earnings?" From the leading case

of New York Life Ins. Co. v. Bank of Italy, 60 Cal.App. 602, 214 P. 61, through the many intervening cases, down to Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 26 P.2d 482, the only test applied to this problem has been whether the premiums (on a policy issued on the life of a husband after coverture) are paid entirely from community funds. If so, the policy becomes a community asset and the nonconsenting wife may recover an undivided one-half thereof "without regard" [as said in Dargie v. Patterson, 176 Cal. 714, 721, 169 P. 360, 362] "to the amount or condition of the estate remaining in his [the husband's] hands at the time of his death", and we might add, without regard to the disproportionate size of the premium when compared with the face of the policy.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

35 Cal.App.2d 466

COMSTOCK v. BOARD OF TRUSTEES OF COMPTON JUNIOR COLLEGE DIST. IN LOS ANGELES COUNTY et al.

Civ. No. 11881.

District Court of Appeal, Second District, Division 1, California.

Nov. 15, 1939.

Hearing Denied Jan. 11, 1940.

1. Schools and school districts ⊂⊃141(6)

Where attempted summary dismissal of probationary teacher in junior college district was ineffective because of failure to follow proper procedure, and teacher was restored to his position, his occupancy thereof continued until terminated by one of the methods provided by statute. School Code, § 5.680, as amended by St.1935, p. 1884.

2. Schools and school districts ⊂⊃141(5)

Where attempted summary dismissal of probationary teacher in junior college district during the school year for cause was ineffective because of failure to follow proper procedure, the notice of dismissal could not be relied on as a sufficient notice of dismissal from service for the ensuing year. School Code, § 5.680, as amended by St.1935, p. 1884, § 5.681 as amended by St.1931, p. 1398.

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Mandamus proceeding by Edwin Walker Comstock against the Board of Trustees of the Compton Junior College District in the County of Los Angeles, State of California, and others to compel payment of salary as a teacher in the Compton Junior College District. From a judgment granting a peremptory writ of mandate, the defendants appeal.

Affirmed.

J. H. O'Connor, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for appellants.

Tanner, Odell & Taft and Robert A. Odell, all of Los Angeles, for respondent.

YORK, Presiding Justice.

Respondent, a probationary teacher in the Compton Junior College District for a number of years, on December 20, 1935, received the following notice of dismissal signed by the clerk of the Board of Trustees of said district:

"Dear Mr. Comstock: You are hereby notified that the Board of Trustees of the Compton Junior College District, at a meeting held December 19, 1935, upon motion by Mr. Reber, seconded by Mr. Nestor and carried unanimously, passed a resolution to dismiss you from your present position as a teacher in the Compton Junior College District and to terminate your contract in accordance with section 5.680 of the School Code of the State of California, and particularly because of unprofessional conduct and persistent violation of, or refusal to obey, the school laws of California, or reasonable regulations prescribed for the government of the public schools. This dismissal is to take effect at the end of the present school month which is January 3, 1936."

Respondent refused to accept said letter as sufficient notice of his dismissal and on June 2, 1936, demanded his reinstatement as a probationary teacher of the said school district. His demand having been refused by the governing board, respondent on June 5, 1936, sought a writ of mandate to compel his restoration to his position and the payment of his back salary. On July 6, 1936, the trial court entered its judgment in said proceeding, decreeing that respondent have judgment as prayed for in his petition and "that a peremptory writ of mandate issue out of and under the direction of this Court, directing and commanding said defendants forthwith to admit plaintiff to his said employment and position as a full time probationary teacher of printing and linotype in the Compton Junior College District", and directing said defendants (appellants here) to draw their warrant for the payment to respondent of his salary in the sum of $1,123.85, being for the months of January, February, March, April and May, 1936. Said judgment was affirmed upon appeal (Comstock v. Board of Trustees, 20 Cal.App.2d 731, 67 P.2d 694), this court holding in a decision rendered on May 8, 1937, that the purported dismissal of January 3, 1936, was ineffectual because the proper procedure for dismissal had not been followed.

On November 23, 1937, respondent made written demand upon appellants that they issue their warrant for an amount equal to his salary for the year 1936-37 and for the last month of the school year 1935-36, to-wit: the month of June, less the amount which he had earned during that period at casual employment. This demand was refused, whereupon respondent instituted the instant proceeding in mandamus, contending that since the governing board did not notify him on or before May 15, 1936, that his services would not be required for the ensuing year, as provided by section 5.681 of the School Code, he was automatically reelected for the school year 1936-37 by virtue of section 5.401 of said School Code.

It is conceded by respondent that on May 11, 1937, appellants notified him in writing pursuant to section 5.681 of the School Code that his services would not be required for the year 1937-38.

The trial court herein found, among other things: "It is untrue that said notice of December 20, 1935, served to notify plaintiff that his services would not be required by the said defendant Compton Junior College District for the school year 1936-37, and it is untrue that said notice was given pursuant to the provisions of section 5.681 of the School Code."

This appeal is prosecuted from the judgment which was thereafter entered granting a peremptory writ of mandate commanding appellants to draw and deliver to respondent their warrant and demand for the sum of $1,892.47, which represents respondent's salary for the last month of the year 1935-36, to-wit: June, 1936, and also the balance of his salary for the year 1936-37 after deducting therefrom the sum of $580 which the trial court found had been earned by him at casual employment during the school year 1936-37.

The question here presented for determination is whether or not the notice of December 20, 1935, which was involved in the first proceeding in mandamus between the same parties, and which purported to be a dismissal for cause under section 5.680 of the School Code, may be relied upon in the instant proceeding in mandamus as a sufficient notice of dismissal of a probationary teacher under the provisions of section 5.681 of said code.

Section 5.680 of said code (as amended by St.1935, p. 1884) provides: "Governing boards of school districts shall have power and it shall be their duty to dismiss probationary employees during the school year for cause only as in the case of permanent employees."

Section 5.681 of the same code, as amended in 1931 (Stats.1931, p. 1398) changing from June 10th to May 15th the date upon which notice shall be given, reads as follows: "On or before the fifteenth day of May in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year. * * *"

Both permanent and probationary employees are deemed to be reemployed under section 5.401 of the School Code from year to year, except that probationary employees who are notified of their dismissal prior to May 15th cannot avail themselves of the statutory presumption of reemployment.

It is urged by appellants that the notice of December 20, 1935, was notice to respondent that he would not be employed for the school year of 1936-37, as required by section 5.681 of the School Code.

Respondent argues that said notice of December 20, 1935, did not, in terms or in legal effect, meet the requirements of section 5.681, supra, for the following reasons: "*First:* Because it did not, in substance or effect, notify respondent that his services would not be required for the school year 1936-37. *Second:* It states on its face that it is a notice under the provisions of section 5.680, purporting to be a notice for cause under the provisions of that section and to be effective on January 3, 1936. *Third:* Appellants having undertaken to dismiss respondent for an alleged cause peremptorily and the procedure having been adjudged a nullity, appellants may not now change front and convert the notice of December 20, 1935, into a notice intended to be given under provisions of section 5.681, having reference to employment for the next ensuing school year."

[1] Appellants by simply giving notice to respondent on December 20, 1935, that his services would not be required after January 3, 1936, sought to effect a summary dismissal of respondent during the school year for cause. The trial court determined, and was upheld by this court on appeal, that such dismissal was ineffective because the proper procedure had not been followed, and on July 2, 1936, ordered that a peremptory writ of mandate issue restoring respondent "to his said employment and position as a full time probationary teacher" in the Compton Junior College District, and directed payment be made to him of his salary for the months of January, February, March, April and May, 1936.

It is obvious, therefore, that the notice of December 20, 1935, was never intended by appellants as a notice under section 5.681 of the School Code for the reason that, so far as appears from the record, no attempt was ever made to have the trial court limit its judgment to payment of back salary without reinstating respondent in his position. In other words, at the time of the actual entry of the judgment in the first proceeding the school year 1935-36 had expired, and if the contention which appellants now urge had been advanced then and found meritorious by the trial court, respondent would not have been entitled to reinstatement, but would have been afforded complete relief by the issuance of the writ directing payment to him of his back salary. However, having been restored to his position, his occupancy thereof continued until terminated by one of the methods provided by the School Code.

[2] Appellants having put the notice of December 20, 1935, to a test in which it was found wanting, they cannot set it up in a subsequent proceeding claiming that they intended it to serve in another and different role, to-wit: notice under section 5.681 of the School Code that respondent's services would not be required for the ensuing year of 1936-37.

Under all of the facts and circumstances presented by the record herein, we are convinced that respondent's services were not terminated until service upon him by appellants of their notice of May 11, 1937, that his services would not be required for the ensuing year of 1937-38.

Interpreting the language of section 1609 of the Political Code, which later found its way into the School Code in section 5.650 et seq., the court in the leading case of Blalock v. Ridgway, 92 Cal.App. 132, at page 136, 267 P. 713, at page 714, said: "It must be apparent that, except for good cause, the Board of Trustees could not discharge a probationary teacher on April 1st, let us say, so as to dispense with her services for the remainder of that school year. It must be equally clear that on June 11th they could not dispense with her services except for good cause, for the very obvious reason that the law, operating upon their inaction, has brought into being on that day a new contract for the ensuing year which is just as obligatory upon the board as the one which existed on April 1st. It would follow in logical sequence that the Legislature declared its intention to fix the 10th day of June as the dead line—to make the giving of a written notice before that time the essence of the thing to be done to effectuate the discharge. In such cases the requirements of the statute must be held to be mandatory and not merely directory. * * * the Legislature has said in effect that the board 'cannot' discharge a probationary teacher except in the mode and manner specified." See, also, Salmon v. Allen, 1 Cal.App.2d 115, 36 P.2d 153; Caminetti v. Board of Trustees, 1 Cal.2d 354, 34 P.2d 1021; Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029.

For the reasons stated, the judgment appealed from is affirmed.

I concur: WHITE, J.

I dissent: DORAN, J.

96

96

CALIFORNIA REPORTER

IN VOLUME

96 PACIFIC REPORTER
SECOND SERIES

14 Cal.2d 563

EVANS, Building and Loan Com'r, v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.
S. F. 16245, 16268.

Supreme Court of California.
Nov. 9, 1939.
Rehearing Denied Dec. 8, 1939.

1. Statutes 🔑225

Provisions in building and loan association act empowering building and loan commissioner to license and supervise such associations, and to take possession of and to liquidate business of associations, must be considered together. Gen.Laws 1937, Act 986, §§ 13.01 to 13.16a.

2. Building and loan associations 🔑1, 45 (1, 3)

The building and loan association act was intended to provide comprehensive plan for supervision of such associations generally, and for liquidation of associations, and for payment of ordinary costs of general supervision out of public funds, and for payment of extraordinary costs of special examinations, special appraisements, and liquidation out of funds of association involved. Gen.Laws 1937, Act 986, §§ 13.11 to 13.16a.

3. Building and loan associations 🔑1, 45(3)

The provisions in building and loan association act empowering building and loan association commissioner to license and supervise such associations and to take possession of and to liquidate associations must be liberally rather than strictly construed in determining powers of commissioner. Gen.Laws 1937, Act 986, §§ 13.01 to 13.16a.

4. Building and loan associations 🔑45(3)

The provisions of building and loan association act empowering building and loan commissioner to take possession of and liquidate associations authorize commissioner to employ special counsel, accountants, and appraisers and to compensate them out of funds of association involved, at any time after taking possession of association, and not merely after termination in his favor of suit to enjoin further proceedings and after his determination to proceed with the liquidation. Gen.Laws 1937, Act 986, §§ 13.06, 13.07, 13.11, 13.16.

5. Building and loan associations 🔑45(3)

The building and loan commissioner, upon taking possession of building and loan association and throughout liquidation of association, has the status of a trustee of a trust in private property. Gen.Laws 1937, Act 986, §§ 13.11 to 13.16a.

6. Officers 🔑30
Trusts 🔑171

While public officer does not lose his status as such public officer upon assuming his duties under a statute as a trustee of a private trust, the officer does acquire a new status and his powers and duties must be considered in the light of such status as trustee of a private trust.

7. Trusts 🔑211

A trustee of a private trust can do all acts necessary and expedient to collect, conserve, and protect trust property, to maintain and defend integrity of trust for benefit of beneficiaries, and to employ such assistants as may be necessary for such purposes, and if he acts in good faith he can employ such assistants and compensate them out of assets of trust, even though he does not ultimately succeed in establishing the position taken by him as such trustee.

8. Trusts 🔑211

A public officer acting under statute as trustee of private trust can employ such assistants as may be necessary in collecting, conserving, and protecting trust property and maintaining and defending integrity of trust for benefit of beneficiaries, and can compensate such assistants out of trust assets, even though officer does not ultimately succeed in establishing the position taken by him as trustee, in absence of statutory provisions to the contrary.

9. Building and loan associations 🔑45(3)

The building and loan commissioner, acting under building and loan association act, as trustee of a private trust, upon taking possession of an association and throughout liquidation thereof, had implied power to employ and compensate assistants out of assets of the trust, in absence of statutory provisions to the contrary. Gen.Laws 1937, Act 986, §§ 13.11 to 13.16a.

10. Officers 🔑1

Persons specially employed by public officer acting under a statute as the trustee of a private trust are not "public employees."

[Ed. Note.—For other definitions of "Public Employee," see Words & Phrases.]

11. Attorney general 🔑4
Statutes 🔑225

The statute prohibiting state departments, divisions, and commissions from employing any legal advisor or attorney other than attorney general or his deputies, must be construed in the light of other existing statutes and of the object sought to be accomplished by the enactment of such statute. Pol.Code, § 473a.

12. Attorney general ⚷4

A state department can employ counsel other than attorney general to do state work and to be paid out of public funds in absence of statutory provisions to contrary.

13. Attorney general ⚷4

The purpose of statute prohibiting state departments, divisions, and commissions from employing any legal advisor or attorney other than attorney general or his deputies was to centralize the legal work done on behalf of the state in attorney general's office and to substitute the attorney general and his deputies in the place of the various counsel who were formerly employed on state work in the several departments and who were paid with public funds by the various departments. Pol.Code, § 473a.

14. Attorney general ⚷4

The statute prohibiting state departments, divisions, and commissions from employing any legal advisor or attorney other than attorney general or his deputies eliminated only counsel engaged in state work and paid out of public funds. Pol.Code, § 473a.

15. Attorney general ⚷4

The statute prohibiting state departments, divisions, and commissions from employing any legal advisor or attorney other than attorney general or his deputies does not prevent building and loan commissioner, who has taken possession of building and loan association, from employing, in commissioner's capacity as trustee of private trust, special counsel, to be paid out of trust funds, to advise commissioner in administration of such trust and in maintaining and defending integrity of trust. Gen. Laws 1937, Act 986, §§ 13.01 to 13.16a; Pol. Code, § 473a.

16. Building and loan associations ⚷2

A provision in building and loan association act authorizing building and loan commissioner to employ special legal counsel, accountants, and assistants, who are to be paid out of funds of association, to assist in liquidation of association, was not repealed or amended by enactment of later statute prohibiting state departments, divisions and commissions from employing any legal advisor or attorney other than attorney general or his deputies. Gen.Laws 1937, Act 986, § 13.16; Pol.Code, § 473a.

17. Statutes ⚷166

The re-enactment of statute which was repealed or amended by another statute had the effect of superseding the provisions of the repealing or amending statute. Pol. Code, § 325.

18. Statutes ⚷219

A contemporaneous construction of a statute by officer to whom statute relates is not controlling but is entitled to great respect.

19. Officers ⚷11

Where building and loan commissioner has taken possession of building and loan association, the assistants appointed by commissioner in his capacity as trustee of private trust, solely for specific purpose of furnishing services in connection with the trust, are not "officers or employees of state," and their appointments are not "permanent appointments in the state civil service," within constitutional provision that permanent appointments in state civil service consisting of officers or employees of state should be made exclusively under the merit system. Gen.Laws 1937, Act 986, § 13.16; Const. art. 24, §§ 1, 4.

[Ed. Note.—For other definitions of "Officer," see Words & Phrases.]

20. Injunction ⚷75

A building and loan association which had been taken possession of by building and loan commissioner was not entitled to preliminary injunction restraining commissioner from paying out of assets of association certain sums to special counsel, accountants, and appraisers employed by commissioner to advise him on legal matters connected with business of association and to examine into conditions of affairs of association, since commissioner had power to appoint special counsel, accountants and appraisers immediately upon taking possession of association. Gen.Laws 1937, Act 986, § 13.16.

21. Prohibition ⚷3(1), 10(1)

The writ of "prohibition" is appropriate remedy to arrest proceedings of court when such proceedings are without or in excess of jurisdiction of court, and where there is not a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ.Proc. §§ 1102, 1103.

[Ed. Note.—For other definitions of "Prohibition (Writ of)," see Words & Phrases.]

22. Prohibition ⚷1

The remedy by writ of prohibition is a preventive, rather than a corrective, remedy.

23. Prohibition ⚷13

The operation of writ of "prohibition" is excluded only in cases where action of inferior tribunal is completed and nothing remains to be done in pursuance of its void order, and, if the tribunal's action is not completed and ended, its further proceedings may be stayed, and, if it is necessary for the purpose of affording complete and adequate remedy, what has been done will be undone.

24. Prohibition ⚷10(2)

A preliminary injunction enjoining building and loan commissioner, who had taken possession of building and loan association, from using assets of association to pay for services rendered by special counsel, accountants, or appraisers employed by commissioner, was in excess of superior court's jurisdiction, and writ of prohibition would issue to restrain superior court from any further proceedings directed toward enforcement of preliminary injunction, where remedy by appeal from preliminary injunction was not adequate. Gen.Laws 1937, Act 986, § 13.16.

25. Mandamus ⚷29

A writ of "mandate" is an appropriate remedy when a trial court has improperly refused to recognize the attorney for a party to an action pending before such court.

[Ed. Note.—For other definitions of "Mandate," see Words & Phrases.]

26. Mandamus ⚷29

Where Superior Court improperly refused, in building and loan association's action to enjoin further proceedings by building and loan commissioner who had taken possession of association, to recognize special counsel appointed by commissioner, writ of mandamus would issue directing the Superior Court to recognize such counsel. Gen. Laws 1937, Act 986, § 13.16.

HOUSER, CURTIS, and EDMONDS, JJ., dissenting.

In Bank.

Original proceeding by Ralph W. Evans, as Building and Loan Commissioner of the State of California, against the Superior Court of the State of California in and for the City and County of San Francisco, and the Honorable James G. Conlan, a judge thereof, for writ of prohibition and writ of mandate directed to the respondent superior court.

Peremptory writ of prohibition and peremptory writ of mandate issued.

Rehearing denied; SPENCE, J. pro tem., sitting in place of GIBSON, J., who deemed himself disqualified; CURTIS, EDMONDS, and HOUSER, JJ., dissenting.

For prior decision, see 91 P.2d 1056.

Wood, Crump & Rogers, of Los Angeles, and Cushing & Cushing and Bartley C. Crum, all of San Francisco, for petitioner in both cases.

Everette C. McKeage, of San Francisco, and Richard M. Leonard, amici curiæ in No. 16245.

Breed, Burpee & Robinson, of Oakland, and Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiæ in No. 16268.

Walter H. Linforth and William M. Cannon, both of San Francisco, for respondents in No. 16245.

Sullivan, Roche & Johnson and Orrick, Dahlquist, Neff & Herrington, all of San Francisco, for respondents in No. 16268.

PER CURIAM.

Petitioner, the Building and Loan Commissioner of this state, filed an original proceeding in this court (S. F. No. 16245) seeking a writ of prohibition and a writ of mandate directed to the respondent Superior Court. Respondents filed a demurrer and an answer to the petition but the material facts, for the purpose of this discussion, do not appear to be in dispute.

Pacific States Savings and Loan Company, hereinafter referred to as the "association", was organized in this state and was doing business under the Building and Loan Association Act (Deering's Gen.Laws, Act 986, hereinafter referred to as the "act"). It was one of the largest building and loan associations in the state, having assets valued by the association at approximately $50,000,000 and having investors and other creditors numbering more than 40,000 Among its assets were many large real estate holdings, including hotels, apartment houses, ranches and other properties, which were located in California, Nevada, Arizona and elsewhere, and which holdings were being operated by the association. In the operation of its offices and of said holdings, it employed a vast number of persons. The employees of the association consisted of the usual office employees found in the offices of such associations and the usual employees found in the organization of any corporation operating hotels, apartment houses, ranches and other properties. Among the office employees were several attorneys employed to handle the legal work of the association, including the work of conducting some 40 litigated cases pending in the trial and appellate courts.

As a result of examinations conducted by the petitioner, it appeared to him and he found that the association was in an unsafe condition and was conducting its business in an unsafe and injurious manner such as to render its further proceeding hazardous to the public and to its investors. Petitioner further found that the assets of the associations were then impaired to the extent specified in section 13.11 of the act. He further found that the association had refused to submit certain of its books, papers and accounts to the inspection of petitioner's examiners and had destroyed certain of its records. Petitioner, acting under the powers granted to him under said section 13.11 of the act, did, on the 4th day of March, 1939, demand and take possession of the property, business and assets of the association. Thereafter and within the time permitted by section 13.12 of the act, the association applied to the respondent court seeking to enjoin further proceedings by petitioner. Said action was numbered 286711 in the files of said court and will be hereinafter referred to as the main injunction suit. Petitioner filed his answer in said suit and the trial thereof commenced on March 20, 1939. The trial had already consumed 30 trial days and was then but partially completed when the investors' suit hereinafter mentioned was commenced in the respondent court.

After taking possession, petitioner employed special counsel for the purpose of defending the main injunction suit and for the purpose of advising him on and handling other legal matters connected with the business of the association and the numerous enterprises in which the association was engaged. Petitioner also employed accountants and appraisers for the purpose of further examining into the condition of the affairs of the association and its various enterprises. In addition to the litigation pending at the time petitioner took possession, there has since been filed a jeopardy assessment lien upon a claim for income taxes in the sum of approximately $1,800,000. It further appears that since taking possession, the commissioner, through his special counsel, has presented 21 applications to the superior court under section 13.13 of the act involving 304 separate contracts.

On May 8, 1939, Edward E. Cleese and others, individually and as members of an investors' committee, filed an action against petitioner and others in the respondent court seeking an injunction and declaratory relief. Such action was numbered 287901, in the files of said court and will be hereinafter referred to as the investors' suit. The main purpose of said suit was to obtain an injunction restraining petitioner from paying out of the assets of the association any sums to the special counsel, accountants and appraisers employed by petitioner as hereinabove indicated. Petitioner filed a demurrer in said suit which demurrer was overruled. He thereafter filed his answer. On May 18, an order to show cause why a preliminary injunction should not issue came on for hearing. The matter was submitted on affidavits and the trial court announced its intention to issue the preliminary injunction sought by the investors. The first of the pending proceedings in this court (S. F. No. 16245) was thereupon commenced but prior to the issuance of the alternative writ in said proceeding, the preliminary injunction had been signed and filed.

The material provisions of said preliminary injunction may be summarized as follows: Petitioner was enjoined, during the pendency of the investors' suit, from paying out any of the assets of the association for any services rendered or to be rendered by any of the special counsel, accountants, or appraisers who had been employed by petitioner and "generally restraining said defendants * * * from using any of the money or property of said Pacific States Savings and Loan Company for the abovementioned purposes or any of them". It was specifically provided, however, that the injunction did not enjoin payment for services rendered or to be rendered by persons in the employ of the association at the time of the seizure or the payment of any sums authorized by law to be paid to the attorney-general for legal services rendered by him or his deputies.

The original purpose of the first of the pending proceedings before this court (S. F. No. 16245) was to prohibit the respondent court from issuing said preliminary injunction in the investors' suit and to compel said superior court to recognize the attorneys employed by petitioner and to permit them to appear for petitioner in the main injunction suit. Said injunction has since been issued but it is the claim of petitioner that if he was originally entitled to the relief requested, he should not now be denied appropriate relief by this court.

After the issuance of the injunction in the investors' suit, the trial of the main injunction suit was resumed on June 14, 1939. Plaintiff in the main injunction suit then objected for the first time to the appearance of any attorney on behalf of the commissioner in that suit other than the attorney-general, his assistants or deputies. The trial court made its minute order sustaining said objection and ordering that the commissioner "may not appear in the above entitled case in propria persona or by any attorney other than the attorney-general, his assistants or deputies". Petitioner then commenced the second of the pending proceedings before this court (S. F. No. 16268), being a proceeding seeking a writ of mandate to compel the respondent court to recognize petitioner's special counsel and to permit said counsel to appear for said petitioner in said main injunction suit.

It is apparent from the briefs on file herein that the main question involved in this controversy is whether the petitioner had the power, upon taking possession of the association, to employ necessary assistants of his own choosing consisting of special counsel, accountants and appraisers, and to compensate said assistants out of the assets of the association. A secondary question is involved which relates to the nature of the relief which may be extended to petitioner under the circumstances in the event that it is determined that petitioner had the power above mentioned. We shall consider these questions in the order mentioned.

It was the claim of the plaintiffs in the investors' suit and it is the claim of respondents here that such power did not exist. It is contended that such power was not granted by the provisions of the act and that in any event, the provisions of the act as amended in 1931 (Stats. 1931, chap. 269, p. 483) were superseded in part by the enactment in 1933 of section 473a of the Political Code relating to the office of attorney-general and by the adoption in 1934 of article XXIV of the Constitution relating to civil service. The questions presented by these contentions are not free from difficulty and we shall first proceed to an examination of the pertinent sections of the Building and Loan Act and shall thereafter consider the effect of the subsequent enactment of section 473a of the Political Code and the subsequent adoption of article XXIV of the Constitution.

The act in question empowered the building and loan commissioner to license and supervise building and loan associations. (Secs. 13.01 to 13.10.) It also empowered the commissioner to take possession of and to liquidate the business of such associations under certain conditions. (Secs. 13.11 to 13.16a.) With certain exceptions, the sections of the act conferring these powers upon the commissioner have not been amended since 1931. Said sections will be considered in the form in which they stood at the time of the seizure in 1939 and particularly with reference to the power of the commissioner to employ assistants and the manner of compensating such assistants.

Section 13.02 provided that: "The commissioner shall have power to appoint an attorney, and such deputies and such examiners, * * * appraisers and other assistants as he may require to discharge in a proper manner the duties imposed upon him by law; and to fix their powers and duties, and such compensation as shall be prescribed or authorized by law or laws enacted subsequent to the enactment of this act. Each of such deputies before he shall enter upon the duties of his office shall take and subscribe an official oath as provided by law. The commissioner's attorney and three of his deputies shall not be subject to any civil service law of this state."

Section 13.06 provided for regular examinations by the commissioner of the affairs of each association at least once in each year. Said section also provided: "Whenever in the judgment of the commissioner the condition of any association renders it necessary or expedient to make an extra examination or to devote any extraordinary attention to its affairs, the commissioner shall have authority to make any and all necessary extra examinations and to devote any necessary extra attention to the conduct of its affairs and may cause a certified public accountant or accountants appointed by the commissioner to make an audit of such association's business and affairs; and in any such case such association shall pay a reasonable price to be fixed by the commissioner for all such extra services rendered by the commissioner or by such accountants."

Section 13.07 provided for the making of a revaluation by the commissioner of the property and investments of any association and that "For that purpose, the commissioner may use his own appraisers or may appoint local appraisers, who shall be disinterested persons, at the expense of such association payable to the commissioner in advance upon demand."

Section 13.11 provided that if the commissioner found from any examination or report that any association was conducting its business in an unsafe or injurious manner or that its assets were impaired to the extent stated therein, he could forthwith demand and take possession of the property, business and assets of such association and retain the same until the association was permitted to resume business or until its affairs were liquidated.

Section 13.12 provided that whenever the commissioner had taken possession of an association as above indicated, such association could apply within thirty days to the superior court to enjoin further proceedings, in which action the court could, after a hearing upon the merits, dismiss the application or enjoin the commissioner from further proceedings.

Section 13.13 provided for the appointment of a custodian by the commissioner upon taking possession. It further empowered the commissioner to do all "acts as are necessary or expedient to collect, conserve or protect its business, property and assets" and provided that "unless the commissioner shall be enjoined from further proceedings * * * or unless such association shall with the consent of the commissioner resume business, then the commissioner shall proceed to liquidate the affairs of such association as hereinafter provided". The section then conferred additional powers on the commissioner, including the power to apply to the superior court for orders authorizing the commissioner "to do any act or to execute any instrument not expressly authorized by this act". It is under this section that the commissioner, through his special counsel, has made 21 applications involving 304 separate contracts relating to the affairs of the association.

Section 13.16 provided that "In liquidating the affairs of an association, the commissioner shall have power [then enumerating various powers]." The section continues: "The commissioner may under his hand and official seal appoint one or more special deputies to assist in the duties of liquidation and distribution under his direction and may also employ such special legal counsel, accountants and assistants as may be needful and requisite and fix the salaries and compensation to be allowed and paid to each. All such salaries and compensation with such other reasonable and necessary expenses as may be incurred in the liquidation shall be paid by the commissioner from the funds of such association in his hands. Such expenses shall include, among other things, that part of the salary of the commissioner and of his deputies, examiners, accountants, appraisers and other assistants, and that part of the general expenses of the commissioner's office, as shall fairly represent, in the opinion of the commissioner, the proportion thereof properly attributable to such liquidation."

[1-4] Respondents apparently concede that section 13.16 of the act expressly empowers the commissioner to employ assistants such as special counsel, accountants and appraisers, and to compensate such assistants out of the funds of an association in his hands under certain circumstances, but it is respondents' claim that the commissioner will have no such power here until the main injunction suit may have terminated in his favor and until he may have determined to proceed with the liquidation of said association. We do not believe that this claim may be sustained. The above-mentioned sections of the act should be considered together (Yager v. Superior Court, 139 Cal.App. 84, 33 P.2d 451) and when so considered, it is apparent that the legislature intended to provide a comprehensive plan for the supervision of building and loan associations generally and for the liquidation of particular associations under certain conditions. It is further apparent that the legislature intended that the ordinary costs of general supervision should be paid out of public funds raised under the provisions of section 13.17 of the act and that the extraordinary costs, such as those required for special examinations (sec. 13.06), special appraisements (sec. 13.07), and liquidation (sec. 13.16), should be paid in each instance out of the funds of the particular

association involved. It has been held that a liberal rather than a strict construction should be placed upon said sections in determining the powers of the commissioner (Wilson v. Superior Court, 2 Cal.2d 632, 43 P.2d 286), and with the foregoing observations in mind, we are of the view that the commissioner was empowered to employ necessary assistants and to compensate such assistants out of the funds of the association as provided in section 13.16 at any time after taking possession of said association. With reference to such assistants, the section provides that the commissioner may appoint them "to assist in the duties of liquidation and distribution". Respondents argue for a strict construction of the word "liquidation" in this connection but it is apparent that the taking of possession by the commissioner under section 13.11 is a necessary and integral part of the process of liquidation and that the commissioner should be held to have the power to employ necessary assistants as provided in section 13.16 from the time of taking possession, at which time the need for such assistants appears to be the greatest. To hold otherwise would mean that the commissioner would be empowered by the act to employ certain assistants such as accountants and appraisers at the expense of the association prior to taking possession (secs. 13.06 and 13.07), but that such powers would be suspended upon taking possession to be again revived only after the termination of the injunction suit and after the determination of the commissioner to proceed with the liquidation. In the meantime, all such expense incurred would necessarily be paid out of public funds rather than out of the funds of the association which is contrary to the evident purpose of the act. We therefore conclude that the act expressly granted to the commissioner the powers claimed by him and as will hereinafter appear, we are further of the opinion that such powers may be implied without resort to the express provisions of section 13.16 of the act.

[5-9] Before discussing the effect of the enactment in 1933 of section 473a of the Political Code and of the adoption in 1934 of article XXIV of the Constitution, it appears appropriate to consider the status of the commissioner upon taking possession and throughout liquidation. During such time, the commissioner has the status of a trustee of a trust in private property, or in other words, the status of a trustee of a private trust. As was said in Richardson v. Superior Court, 138 Cal. App. 389, at page 394, 32 P.2d 405, at page 407, "While it thus appears that the authority of the commissioner over the property and business affairs of the association when in his custody is subject to certain prescribed judicial review and control, the principal characteristics of his position as administrator are those of a public officer charged with a statutory duty which, for reasons of public policy, has been made to include a trust in private property." In Mercantile Trust Company v. Miller, 166 Cal. 563, at page 569, 137 P. 913, at page 916, the status of the superintendent of banks in liquidating a bank was described as that of a "trustee of this express trust". In Brandon v. Anglo-California Trust Co., 177 Cal. 699, at page 702, 171 P. 956, at page 958, it was said that the building and loan commissioner, in possession of an association, was "in effect the receiver" and in Re Union Building & Loan Association, 16 Cal.App.2d 301, 60 P.2d 562, his status was compared to that of a guardian. See, also, First State Bank v. Conant, 117 Neb. 562, 221 N.W. 691. In one case, it is said "that the superintendent of banking, as such, and the superintendent of banking as receiver are juridically two persons". Bates v. Niles & Watters Sav. Bank, Iowa, 285 N.W. 626, 627. It is of course clear that a public officer does not lose his status as such public officer upon assuming his duties under a statute as a trustee of a private trust (Mitchell v. Taylor, 3 Cal.2d 217, 43 P.2d 803), but it is equally clear that he does acquire a new status and that his powers and duties must be considered in the light of such status as the trustee of such private trust. Carpenter v. Pacific Mutual Life Insurance Company, 10 Cal.2d 307, 74 P.2d 761. It requires no citation of authority to support the proposition that among the ordinary powers and duties of a trustee of a private trust are those of doing all acts necessary and expedient to collect, conserve and protect the property of the trust, to maintain and defend the integrity of the trust for the benefit of the beneficiaries and to employ such assistants as may be necessary for said purposes. If the trustee acts in good faith, he has the power to employ such assistants and to compensate such assistants out of the assets of the trust even though he may not ultimately succeed in establishing the position taken by him as such trustee. Dingwell v. Seymour, 91 Cal.App. 483, 267 P. 327; see, also, Estate of Duffill, 188 Cal.

536, 206 P. 42. It would seem to follow that, in the absence of statutory provisions to the contrary, a public officer, acting under a statute as the trustee of a private trust, would have similar powers and duties. There are no provisions to the contrary in the act itself and unless there are other statutory provisions necessitating a different conclusion, it should be held that the commissioner had the implied power to employ and compensate such assistants and that he could rely upon such implied power as well as the express power granted by section 13.16 of the act.

[10] The status of such public officers acting as such trustees is further clarified by the authorities holding that persons specially employed by such officers in the administration of such private trusts are not public employees. Helvering v. Therrell, 303 U.S. 218, 58 S.Ct. 539, 82 L.Ed. 758; In re Kinney, 257 App.Div. 496, 14 N.Y.S. 2d 11; White v. Boland, 254 App.Div. 356, 5 N.Y.S.2d 119; Davie v. Commissioner, 26 B.T.A. 1007. This view appears to be the only logical one for otherwise the state would be liable for certain negligent acts of all persons specially employed by the commissioner in the administration of the trust, including the numerous persons employed in the various enterprises formerly conducted by the association. Vehicle Code, sec. 400, St.1935, p. 152.

We now come to the claim that the commissioner may be represented only by the attorney-general and that he may not employ special counsel of his own choosing and compensate such special counsel out of the funds of the association. Said claim is based upon section 473a of the Political Code, enacted in 1933 and the discussion up to this point has proceeded without reference to said section.

That section provides:

"No department, division, commission, bureau, board, office or institution of the State [with certain exceptions not material here], shall employ any legal advisor or attorney other than the Attorney General, or one of his assistants or deputies, in any matter in which such department, division, commission, bureau, board, office or institution is interested.

"Whenever the provisions of any existing statute authorize any department, * * * to employ an attorney or attorneys or any person in a legal advisory capacity * * * the terms of such statute shall * * * be deemed and construed to refer to an assistant or assistants, deputy or deputies, of the Attorney General. * * *

"The cost of all such legal services performed or rendered by the Attorney General * * * for a * * * department * * * which is supported otherwise than by appropriations from the general fund in the State treasury, shall be a charge against, and shall be paid from the moneys and funds appropriated, or made available by law, for the support of such department * * *, and shall be fixed and determined by the Attorney General. All moneys paid for such services * * * shall be paid into the State treasury to the credit and in augmentation of the current appropriation for the support of the Attorney General's office, to be expended in accordance with law, for the support of said office."

[11-17] It must be conceded at once that the provisions of said section 473a appear to be quite broad and sweeping but said provisions must be construed in the light of other existing statutes and of the object sought to be accomplished by the enactment of said section 473a. Prior to the enactment of said section, many state departments had employed counsel, other than the attorney-general, which counsel were engaged in doing state work and were paid out of public funds. In the absence of statutory provisions to the contrary, said departments had that power. State Compensation Insurance Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985. Many statutes relating to various departments expressly conferred that power and such was the case with respect to the Building and Loan Act (Sec. 13.02). The object of the enactment of said section 473a was obviously to centralize the legal work done on behalf of the state, with certain exceptions, in the office of the attorney-general and to substitute the attorney-general, his assistants and deputies in the place and stead of the various counsel who were formerly employed on state work in the several departments and who were paid with public funds by the various departments. That the object of said section was to eliminate only counsel engaged in state work and paid out of public funds and to substitute the attorney-general for such counsel seems clear from the portion of the section dealing with the payment of the cost of the added legal services to be performed by the office of the attorney-general. Such cost was to "be fixed and determined by the Attorney General" as to

each department and was to be paid "from the moneys and funds appropriated, or made available by law, for the support of such department" and was to be paid into the state treasury "to the credit and in augmentation of the current appropriation for the support of the Attorney General's office * * *". It therefore appears that said section has no application to special counsel, employed by the commissioner in his capacity as the trustee of a private trust for the purpose of advising him in the administration of such private trust and in maintaining and defending the integrity of such trust. Such counsel are neither engaged in state work in any fair sense of the term nor are they to be paid out of public funds. Their compensation is to be fixed by the commissioner and is to be "paid by the commissioner from the funds of such association in his hands". Sec. 13.16. We are therefore of the opinion that there was no conflict between said section 13.16 and said section 473a and that the former was not repealed or amended by the enactment of the latter. Furthermore, if it can be said that the enactment of said section 473a in 1933 did repeal or amend in part said section 13.16 as it stood at that time, then the reenactment of said section 13.16 in 1935 had the effect of superseding in part the provisions of said section 473a for the general rule set forth in section 325 of the Political Code relating to the reenactment of portions of a statute would not apply. Estate of McGee, 154 Cal. 204, 97 P. 299.

[18] We have not dealt with the subject of contemporaneous construction in the above discussion and it will suffice to state that it appears that such contemporaneous construction is in accord with the views which we have expressed. We need search no further than the published reports to find that the commissioner and his predecessors have been represented by special counsel and not by the attorney-general in numerous cases arising since 1933. North American Bldg. & Loan Ass'n v. Richardson, 6 Cal.2d 90, 56 P.2d 1221; Holabird v. Richardson, 3 Cal.2d 299, 44 P.2d 530; Wilson v. Superior Court, 2 Cal.2d 632, 43 P.2d 286; North American Bldg. & Loan Ass'n v. Richardson, 219 Cal. 685, 28 P.2d 1044; Mestres v. California Mutual Bldg. & Loan Ass'n, 24 Cal.App.2d 434, 75 P.2d 74; Bureau of Welfare v. Drapeau, 21 Cal.App.2d 138, 68 P.2d 998; In re Union Bldg. & Loan Ass'n, 16 Cal.App.2d 301, 60 P.2d 562. The same may be said of the superintendent of banks. Burket v. Bank of Hollywood, 9 Cal.2d 113, 69 P.2d 421; In re Bank of San Pedro, 1 Cal.2d 675, 37 P.2d 80; In re First Exchange State Bank, 26 Cal.App.2d 533, 79 P.2d 768; W. J. Wallace & Co. v. Growers Security Bank, 13 Cal.App.2d 743, 57 P.2d 998. Such contemporaneous construction is not controlling but it is entitled to great respect. People v. Southern Pacific Company, 209 Cal. 578, 290 P. 25; Riley v. Thompson, 193 Cal. 773, 227 P. 772; Riley v. Forbes, 193 Cal. 740, 227 P. 768; City of Pasadena v. Railroad Commission, 192 Cal. 61, 218 P. 412; 23 Cal.Jur. 775, sec. 151. Nor have we considered authorities from other jurisdictions dealing with the duties of the office of attorney-general. We believe, however, that it is generally held that the handling of litigation, such as is involved here, is not normally the duty of the attorney-general and that such litigation should not be conducted at public expense. People v. Marquette Nat. Fire Ins. Co., 351 Ill. 516, 184 N.E. 800.

[19] Turning to respondents' claim that the commissioner is bound by the provisions of article XXIV of the Constitution relating to civil service in employing such assistants, we believe that this claim has been largely answered by what has already been said. Section 1 of said article states that "Permanent appointments and promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination." Section 4 of said article states that, "The provisions hereof shall apply to, and the term 'State civil service' shall include, every officer and employee of this State except [then stating certain exceptions not material here]." As above indicated, we are of the view the assistants appointed by the commissioner in his capacity as a trustee of a private trust and solely for the specific purpose of furnishing services in connection with said trust are not officers or employees *of the state* and it cannot be said that their appointments are "permanent appointments * * * in the State civil service".

In considering the status of certain employees of the superintendent of banks, acting in his capacity as liquidator, it was held in White v. Boland, 254 App.Div. 356, 5 N.Y.S.2d 119, 122, that said employees were not "employees of the State or an agency thereof, so as to be excepted from the provisions of the Labor Relations Act". The court there proceeded to point out that such employees had never been held to be employees of the state or any agency thereof for the purposes of other statutes such as the Civil Service Law, the New York Unemployment Insurance Law, the Federal Social Security Law, laws relating to taxation, Workmen's Compensation Law and the like. At page 124, of 5 N.Y.S.2d the court said, "The anomalous and onerous consequences that would follow from treating them otherwise are too obvious to mention." See, also, In re Kinney, 257 App. Div. 496, 14 N.Y.S.2d 11.

Respondents rely strongly upon State Compensation Insurance Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985, and Stockburger v. Riley, 21 Cal.App.2d 165, 68 P.2d 741, in this phase of their argument. We find nothing in these cases which is at variance with the views hereinabove expressed. In each of said cases the person involved was employed to do state work and was to be paid out of public funds. Neither case indicates that persons employed by a state official in his capacity as the trustee of a private trust and paid out of the assets of the trust are subject to the civil service laws of this state.

[20] From what has been said and by way of summary we conclude that the commissioner had the power, upon taking possession of the association, to employ the above-mentioned necessary assistants, such as special counsel, accountants and appraisers, and to compensate said assistants out of the assets of the association; that it was no part of the duty of the attorney-general under section 473a or otherwise to perform the necessary legal services required by the commissioner in his capacity as a trustee of a private trust; and that the assistants employed by the commissioner in his capacity as such trustee were not subject to the civil service laws. It follows that the injunction should not have been issued.

[21] This brings us to a consideration of the remedy available to the petitioner. The writ of prohibition is an appropriate remedy to arrest the proceedings of a court "when such proceedings are without or in excess of the jurisdiction" of such court (Code Civ.Proc., sec. 1102) and "where there is not a plain, speedy, and adequate remedy in the ordinary course of law" (Code Civ.Proc., sec. 1103). We believe that the trial court in the present case has acted and is acting in excess of its jurisdiction in granting and enforcing the preliminary injunction. We have heretofore held that the statute authorized the commissioner to appoint necessary assistants and it appears that the proceedings of the trial court are preventing the exercise of the authority thus conferred upon him. In the recent case of Rodman v. Superior Court, Cal.Sup., 89 P.2d 109, this court had occasion to discuss the meaning of the term "jurisdiction" and the question of what constituted proceedings in excess of jurisdiction. It was there said on page 113 of 89 P.2d quoting with approval from Spreckels S. Co. v. Industrial Acc. Com., 186 Cal. 256, 199 P. 8: "But the word [jurisdiction] is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of something in excess of the authority possessed." Under the definition approved in said authorities, it seems clear that the proceedings of the trial court were in excess of its jurisdiction. We further believe that the exigencies of the situation make it apparent that the remedy by appeal from the injunction in the investors' suit is not an adequate remedy under the circumstances.

[22-24] It is true as contended by respondents that the remedy by writ of prohibition is a preventive, rather than a corrective remedy (State Board of Equalization v. Superior Court, 9 Cal.2d 252, 70 P. 2d 482), but as was said in Havemeyer v. Superior Court, 84 Cal. 327, at page 390, 24 P. 121, at page 137, 10 L.R.A. 627, 18 Am.St.Rep. 192, "the operation of the writ of prohibition is excluded only in cases where the action of the inferior tribunal is completed, and nothing remains to be done in pursuance of its void order. If its action is not completed and ended, its further proceedings may be stayed; and, if it is necessary for the purpose of affording complete and adequate relief, what has been done will be undone." See, also, Pierce v. Superior Court, 1 Cal.2d 759, at page 783, 37 P.2d 453, 460, 96 A.L.R. 1020; Cosby v. Superior Court, 110 Cal. 45, 42 P. 460; Primm v. Superior Court, 3 Cal.App. 208, 84 P. 786. Thus this remedy has been invoked in numerous cases to prohibit further proceedings by a superior court di-

rected toward the enforcement of a preliminary injunction previously issued by such court. Brock v. Superior Court, 9 Cal.2d 291, 71 P.2d 209, 114 A.L.R. 127; Moore v. Superior Court, 6 Cal.2d 421, 57 P.2d 1314; Reclamation District v. Superior Court, 171 Cal. 672, 154 P. 845; State Board of Equalization v. Superior Court, 5 Cal.App.2d 374, 42 P.2d 1076. The remedy has also been invoked in other situations after the court has acted. Golden State Glass Corp. v. Superior Court, Cal. Sup., 90 P.2d 75; Loftis v. Superior Court, 25 Cal.App.2d 346, 77 P.2d 491; Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399; Elliott v. Superior Court, 168 Cal. 727, 145 P. 101. We therefore conclude that a writ of prohibition may properly issue here to restrain the superior court from any further proceedings directed toward the enforcement of said preliminary injunction.

[25, 26] We further believe that a sufficient showing has been made for the issuance of a writ of mandate. This is an appropriate remedy when a trial court has improperly refused to recognize the attorney for a party to an action pending before such court. Golden State Glass Corp. v. Superior Court, Cal.Sup., 90 P.2d 75. From what has been said, it follows that the trial court has improperly refused to recognize the attorneys for the commissioner in action numbered 286711 in the files of the respondent court.

Let a peremptory writ of prohibition issue in proceeding numbered S. F. No. 16245 restraining the respondents from any further proceedings directed toward the enforcement of the preliminary injunction heretofore issued by the respondent court on the sixth day of June, 1939, in that certain action entitled Cleese et al. v. Evans et al., being action numbered 287901 in the files of said respondent court. And further let a peremptory writ of mandate issue in proceeding numbered S. F. No. 16268 directing respondents to recognize petitioner's special counsel and to permit said counsel to appear for petitioner in that certain action entitled Pacific States Savings and Loan Company v. Evans et al., being action numbered 286711 in the files of said respondent court.

CARTER, J., and GIBSON, J., not having heard the argument, did not participate.

HOUSER, Justice (dissenting).

I dissent.

Reduced to simple language, the principal question that has been submitted to this court is whether—at the expense of the Pacific States Savings and Loan Company—the building and loan commissioner is vested with legal authority to employ special counsel and assistants for the purpose of defending his initial action in "taking possession" of the business of the Pacific States Savings and Loan Company. It is conceded that if any such authority therefor exists, either it must be expressly declared in the language of the general enabling statute, or it must impliedly result therefrom.

It is a matter of public knowledge that, prior to the date of the enactment of section 473a of the Political Code, an evil of considerable magnitude existed in the administration of each of possibly dozens of boards and commissions of this state—in that each of them was legally empowered to select and appoint an attorney to prosecute or to defend any action or suit in which such board or commission actually was or conceived itself to be officially interested. In instances where it had been properly exercised, the effect of that power, in itself, may not have been particularly harmful; but, with the lapse of time, certain patent abuses of such authority crept into the practice, with the usual result that, not only as it affected the general public but also as concerned individuals, the operation of the law which conferred such authority in that regard became extremely objectionable, if not intolerable. Manifestly for the purpose of correcting such condition in the economics of state government, at the 1933 session of the legislature, section 473a of the Political Code was enacted. Since its pertinent provisions have been set forth in the prevailing opinion herein, it becomes unnecessary here to do more than appropriately refer thereto as occasion may arise. But, as far as the instant question is concerned, and, shorn of nonessentials, the purport of the provisions of the statute is that "no * * * commission * * * of the State * * * shall employ any legal advisor or attorney other than the Attorney General * * * in any matter in which such * * * commission * * * is interested. Whenever the provisions of any existing statute authorize any * * * commission

* * * to employ an attorney * * * the terms of such statute shall * * * be deemed and construed to refer to an assistant or * * * deputy * * * of the Attorney General. * * * The cost of all such legal services performed or rendered * * * for a * * * commission * * * shall be paid from the moneys * * * made available by law, for the support of such * * * commission, * * *."

Prior to the enactment of section 473a, Political Code, by the language of section 13.02 of the Building and Loan Act, as amended (Stats.1931, p. 483), it was provided that "The commissioner shall have power to appoint an attorney, * * *." But by section 13.16 of the same act, it was provided that "In *liquidating* the affairs of an association, the commissioner * * * may also employ such special legal counsel * * * as may be needful and requisite * * *. All such salaries * * * as may be incurred in the liquidation shall be paid by the commissioner from the funds of such association * * *." (Emphasis added.) And by the terms of section 4 of an amendment to the Building and Loan Act, which became the law on September 15, 1935, (Stats.1935, pp. 1497, 1502) the commissioner was again accorded authority, in language identical with that contained in the Statutes of 1931 (sec. 13.16), to employ special counsel in liquidating the affairs of a building and loan association.

In the premises, it is the duty of this court to determine the status of the law with respect to the question thus presented whether the commissioner is authorized to select and appoint "special legal counsel" to represent him in his official capacity, particularly with reference to his initial action in "taking possession" of the affairs and business of the Pacific States Savings and Loan Company,—with liquidation thereof probably as his ultimate object. To that end, the legal effect of the 1935 amendment to the Building and Loan Act, to which attention just has been directed, first may be considered. As an initial premise to such consideration, it may not be improper to assume that by the language employed in the Building and Loan Association Act of 1931 the commissioner was empowered, generally, "to appoint an attorney"; and that in *liquidating* the affairs of an association he was authorized to employ "such special legal counsel * * * as may be needful and requisite". Also, it may properly be assumed that by the direct terms of section 473a of the Political Code the commissioner was deprived of the right which he had formerly possessed to employ either general or special counsel. However, the amendment of 1935—as far as it purported to empower the commissioner "in *liquidating* the affairs of an association * * * [to] employ such *special legal counsel* * * * as may be needful and requisite"—was couched in language identical in all respects with that which had obtained in the statute of 1931 with respect to the same situation; and in that regard, in the main decision herein, it is asserted that the effect of the 1935 amendment was that the pertinent provisions of section 473a of the Political Code were impliedly repealed, and that the provisions of the 1931 amendment were restored. In that respect, it should be noted that by the provisions of the statute of 1931 the subject of the appointment of an attorney is divided into two parts,—first, by section 13.02, in which the appointment of *"an attorney"* is authorized, and, secondly, by section 13.16, which provides that "In *liquidating* the affairs of an association, the commissioner shall have power * * to commence and prosecute all actions and proceedings necessary to *enforce liquidation;* * * * and may also employ such *special legal counsel* * * * as may be needful and requisite * * *." Were it not for the serious manner in which the effect of the provisions of section 473a of the Political Code has been considered—and construed to the contrary—in the prevailing opinion herein, it would seem incontestible that language which, in so many words, declares that "No * * * commission * * * shall employ *any* legal advisor or attorney other than the Attorney General" could mean anything other than what it plainly appears to import. And, under the assumption that section 473a actually does mean what it purports to say, the conclusion may be drawn that the commissioner was without authorization either to appoint *"an attorney"* (as had been provided by section 13.02 of the 1931 Building and Loan Association Act), or to employ *"special legal counsel * * * in liquidating* the affairs of an association" (as was also provided by section 13.16 of that act). Thereupon, it may be conceded that the 1935 amendment to the act, by which the provisions of section 13.16 were reenacted,—to the effect that *only in liqui-*

dating the affairs of an association was the commissioner authorized to employ "special legal counsel",—abrogated to *that* extent, but to that extent *only,* the provisions of section 473a of the Political Code. In other words, the 1935 amendment had the effect of restoring to the Building and Loan Association Act the pertinent provisions of section 13.16,—but it had no effect whatsoever on section 13.02 of the act. Otherwise stated, the commissioner had no authority "to appoint *an attorney*", except in connection with the process of *"liquidating"*, pursuant to his *"Powers upon liquidation"* (see caption of section 13.16)—in which event he was authorized to "employ *special legal counsel".* (Emphasis added.)

The original Building and Loan Association Act of this state became the law with reference to building and loan associations in 1893 (Stats. 1893, p. 229). By the provisions of that act, the office of commissioner was created and his powers and duties as such were therein defined. Thereby, generally, he was authorized to examine in minute detail into the financial status of those organizations; and if, on any examination of any such association, in the opinion of the commissioner the business of the association appeared to be in an "unsafe" condition, it became his duty, *through the office of the attorney general,* to institute court proceedings with a view to the possible *liquidation* of such association. In nearly every session of the legislature held since that time, the act has been variously amended, but it was not until 1931 that the act was amended to provide that the attorney general might be relieved of his duties with respect to representing the commissioner in proceedings in court. Prior to 1931, the commissioner was not legally authorized to employ any counsel other than the attorney general, and the latter was authorized to represent the commissioner only in *liquidation* proceedings, or those which related thereto. If it is a fact, as is confidently asserted by the commissioner and so conceded within the prevailing opinion herein, that at all times since the creation of the Bureau of Building and Loan Associations in this state the commissioner has been represented by counsel other than the attorney general, it is clear that such employment was not in accordance with the law, but was contrary to it. The theory of "contemporaneous construction" can be of no avail in the face of such conditions. By statutory provisions, it is clear that two distinct divisions of public business have been recognized as appertaining to the administration of the office of commissioner,—first, the duty of attending to the ordinary routine in connection with the "supervision, examination and license of all building and loan associations", and, secondly, in the event that any such association should be deemed to be "unsafe", that of instigating proceedings which—assuming the facts to justify such action—might result in an order of liquidation. But, as hereinbefore has been indicated, at the legislative session in 1931 the act was so amended that, by the provisions of section 13.02 thereof, the commissioner was empowered "to appoint *an attorney";* and, in addition thereto, in accordance with his *"Powers upon liquidation"*, under section 13.16 of the act, he also was authorized to "employ such *special legal counsel* * * * as may be needful and requisite * * *." But *until "liquidation" has commenced* no such authority is vested in the commissioner, as is clearly indicated by other provisions of the act. Under the caption of *"Power to take possession of association"*, section 13.11, in effect, provides that if, as a result of his examination of the business affairs of an association, the commissioner shall discover the existence of certain specified conditions therein, "then the commissioner may forthwith demand and take possession of the property, business and assets of such association and retain such possession until such association shall with the consent of the commissioner resume business, *or* until its affairs be *liquidated.* Such association may, with the consent of the commissioner, resume business upon such conditions as may be approved by him." Gen. Laws 1937, p. 599. (Emphasis added.) In effect, practically demonstrating the fact that such *"taking of possession"* is no part of *"liquidation"* of the association, but in fact is a proceeding preliminary to and in anticipation of the possibility of such liquidation, section 13.12 plainly provides that "Whenever any association of whose property, business and assets the commissioner has taken possession, as aforesaid, deems itself aggrieved thereby, it may at any time within thirty days after such *taking possession* apply to the superior court of the county in which the principal office of such association is located, to enjoin *further* proceedings; and said court after citing the commissioner to show cause why *further* proceedings should not be enjoined, and hearing the allegations and proofs of the parties and determining the facts, may upon the merits dismiss such application or enjoin the commissioner from *further* proceedings and direct him to surrender such business, property and assets to such association". Gen.Laws 1937, pp. 599, 600. (Emphasis added.) Furthermore, by section 13.13, it is provided that "Unless the commissioner shall be enjoined from *further* proceedings and directed to surrender such business, property and assets or unless such association shall with the consent of the commissioner resume business, *then* the commissioner shall proceed to *liquidate* the affairs of such association as hereinafter provided. Whenever the commissioner shall be in possession of the business, property and assets of any association, and regardless of whether or not he shall be *liquidating* the affairs of such association, the commissioner may in his discretion, [etc.]" Gen.Laws 1937, p. 600. (Emphasis added.) Thereafter, within that same section of the act are found general provisions which relate to various duties and discretionary powers of the commissioner in connection with his application for confirmation by the court of his action in "taking possession" of any association, with regard to the payment of current expenses incurred prior to his taking possession, and also as to his authority to disaffirm any executory contracts to which the association may have been a party. Section 13.14 of the act relates to consequences which may ensue by reason of a refusal by the association to comply with the commissioner's "demand of possession"; and section 13.15 requires that the association "furnish schedule of property". But in the succeeding section, designated as 13.16, may be found the provisions which *set apart* and *distinguish* the act of "taking possession" from that of "liquidation". Furthermore, as hereinbefore has been indicated, by the provisions of section 13.12 of the act, any association which "deems itself aggrieved" by the act of the commissioner in *"taking possession"* is authorized to institute a proceeding in the superior court "to enjoin *further proceedings*" by the commissioner; and after "hearing the allegations and *proofs* of the parties", the court may "upon the merits dismiss such application or enjoin the commissioner from *further proceedings* * * *." (Emphasis added.) As has also hereinbefore been indicated, section 13.16 is entitled *"Powers Upon Liquidation"*. Therein, *following* either a judgment by the court or a prior uncontested determination by the commissioner that *liquidation* shall ensue, the several powers and duties of the commissioner are set forth in detail,—including his right to "employ such special legal counsel * * * as may be needful and requisite * * *." To render unmistakable the fact, herein assumed, that the act of "taking possession" is separate and distinctly severable from the process of "liquidation",—it is clearly shown that by the provisions of section 13.12 either the association or the commissioner is given the right to appeal from a judgment that may be rendered with direct reference to the act of "taking possession". In that regard, the situation may be comparable to that of an administration upon the estate of a deceased person. Although administration of an estate as a whole may consist of one entire proceeding, nevertheless, from each of various and sundry orders which may be made by the court in the course of such proceeding, an appeal is permitted (sec. 1240, Probate Code; 1233, Code Civ.Proc.),—thus indicating that each of the matters embraced within such several orders may be separate and severable from the administration of the estate as a whole.

But, both by counsel who represent the commissioner and by those of my associates who subscribe to the doctrine announced in the prevailing opinion herein, it is declared, first, that the provisions of section 473a of the Political Code apply only to "public" duties of the commissioner; secondly, that in the instant matter the commissioner is not engaged in the performance of a "public act", but that he is merely exercising his prerogative as a trustee in the administration of a private trust,—and as a consequence thereof that he has an implied power to employ "special counsel". With respect to such conclusions, it should be noted that neither by express language contained in section 473a nor by any legal precedent whatsoever is such a determination warranted or justified. The language of section 473a is singularly free from ambiguity. In distinct terms, it declares that "no commission * * * shall employ *any* legal advisor or attorney other than the Attorney General * * * in *any* matter in which such * * * commission * * * is interested". (Emphasis added.) By what process such language may be "construed" so as to exclude from its plain and express import such a matter as the one which forms the basis for the instant controversy is not shown. Moreover, it is clear that authority to perform each and every duty or act that lawfully may be performed by the commissioner as such is derived from the provisions of the statute. In other words, all his powers and duties as a commissioner are derived from the provisions of the enabling statute. All his lawful acts as such commissioner are "public" duties. Certainly as a private citizen he would have no authority to "take possession" of the property and assets of any building and loan association. When he performs such an act, necessarily he assumes to do so solely in his official capacity, with the consequence that his acts in that regard must be deemed to be "public" acts. Except for the proposition that in a sense every public officer in the performance of his duties as such is a trustee for the public, in the instant case there is no resemblance in fact to the relationship of trustor and trustee. In the sense here under consideration, as well one might say that a sheriff in making an unauthorized execution sale in a foreclosure proceeding is a trustee, as to say that the commissioner is a trustee in the instant matter. In respect to the duties of a public officer, in an appropriate case, perhaps a closer analogy might be found in those duties performed by a public administrator in the care and management of the estate of a deceased person. For example, if on the death of a wealthy person, who at the time thereof was living with his wife and children within this state, the public administrator were to seize and "take possession" of the property and assets of the estate,—until his legal authority to do so had been *established*, certainly no such powers as ordinarily flow from a legal trusteeship would be vested in the public administrator; and if, following a contest with regard to his assumed right to "take possession" such act was not sustained by judgment of the court,—by no rule of law or equity would the public administrator be entitled to withdraw funds from those of the estate in order to compensate "special legal counsel" whom he had employed in the matter of his attempt to justify his act in "taking possession" of the assets of the estate. Certainly the act of intrusion and usurpation, even though performed by a public officer in pursuance of an assumed public duty, could form no foundation for a claim of equitable trusteeship sufficient to support an assertion of any rights that might accrue under a trusteeship which might have been legally created, or one which ordinarily might arise from the relationship of the parties. Manifestly, it should be apparent that when the legality of the act of "taking possession" is properly challenged in an appropriate proceeding in court, any principle of equity which ordinarily might be applied with regard to either the express or implied rights and duties of a legally constituted trustee has no application.

If, as heretofore has been suggested, the act of "taking possession" of the assets of an association may properly be considered as a matter distinct and separable from the process of "liquidation" of such association, the language employed in section 13.16 becomes most significant, if not controlling, in the matter of determining whether the commissioner was authorized to employ special counsel in defense of his initial action. In that section, which is captioned *"Powers upon liquidation"*, all the provisions are based upon the assumption that "liquidation" either has been adjudged by the court, or that, in the absence of an objection or contest by the association of the act of the commissioner in "taking possession", the latter—in the exercise of his powers in that respect—has determined that liquidation shall follow. With that consideration in mind, the general language of the section becomes of great importance. It purports to detail the powers of the commissioner—not on *"taking possession"* but specifically, "Upon liquidating". In fact, the opening words of the statute are: "In *liquidating* the affairs of an association, the commissioner shall have power * * * [including that of employing special legal counsel]." (Emphasis added.)

Counsel who represent the commissioner, as well as the members of this court who adhere to the prevailing opinion herein, insist upon "construing" not only the language of section 473a of the Political Code, but also that contained in section 13.16 of the Building and Loan Act. But nowhere is it pointed out what particular words or phrases of either statute are in need of any such treatment. To my mind, the language of each of such statutes, as well as the manner in which it is couched, requires no "construction". That language is so plain, explicit and direct in its import that, in all fairness, its meaning may not be questioned. And, in accordance with the well-established rule, unless the language of a questioned statute is ambiguous or uncertain a court is without authority to "construe" it or to accord to it any meaning other than that which is plainly expressed. 23 Cal.Jur. 721 and authorities there cited.

On consideration, therefore, of the express provisions of the pertinent statutes to which attention hereinbefore has been directed, to my mind the only logical or justifiable conclusion that may be reached thereon is that no authority exists on the part of the commissioner to employ "special counsel" until after liquidation of the affairs of an association has commenced, or where such action has been duly authorized.

Since each of the other questions presented is either subsidiary to or dependent upon the determination reached on consideration of the main question, it becomes unnecessary to devote attention to any of them herein.

We concur: CURTIS, J.; EDMONDS, J.

14 Cal.2d 633

BECKETT v. CITY OF PARIS DRY GOODS CO. (two cases).

S. F. 16283.

Supreme Court of California.

Nov. 21, 1939.

1. Landlord and tenant 🔑20

A lease is both a contract and a conveyance, and under it there are rights and obligations based upon the relationship of landlord and tenant as well as upon the contractual premises.

2. Landlord and tenant 🔑24(1)

No particular legal terminology is required in making a lease, but instrument must show intention to establish the relationship of landlord and tenant.

3. Licenses 🔑44(2)

A contract giving optometrist right to conduct optical department in department store, for a monthly rental of 20 per cent. of total sales, using the terminology of a lease and providing that space should be delivered "in good, tenantable condition," that optometrist should have "the sole and exclusive right" to conduct the department, and that optometrist "cannot assign this lease," was a "lease" and not a mere "license," though store retained a certain amount of control over management and right to designate the space to be occupied.

[Ed. Note.—For other definitions of "Lease" and "License," see Words & Phrases.]

4. Licenses 🔑43, 53, 58(1)

A provision forbidding assignment is not applicable to a "license," which is a personal, revocable, and unassignable permission to do one or more acts on the land of another without possessing any interest therein.

5. Landlord and tenant 🔑5(1)

The use of the terminology of a lease, such as "tenantable," "lease," "demised," and "rental," is not conclusive of intention but strongly indicates that parties contemplated the landlord-tenant relation.

6. Landlord and tenant 🔑24(1, 3)

A lease must include a definite description of the property leased and an agreement for rental to be paid at particular times during a specified term.

7. Landlord and tenant 🔑5(1)

Where one goes into possession of premises under a contract containing an ambiguous description of the property to be occupied, and pays the stipulated rent, the contract will be enforced as a lease if the parties acted upon it as relating to particular premises.

8. Landlord and tenant 🔑103(1), 180(1)

Under department store's lease of space to optometrist for conducting optical department, violations of requirement that all money received by optometrist be turned in at the end of each day were not sufficient to justify forfeiture of the lease, and hence optometrist was entitled to damages for eviction based on such violations.

9. Landlord and tenant 🔑180(4)

An optometrist wrongfully evicted from premises leased by him in department store for optical department was entitled to loss of profits, based on average monthly earnings just before eviction, together with cost of removing furniture and equipment.

10. Landlord and tenant 🔑180(4)

Damages for loss of good will may be recovered for wrongful eviction from lease, under certain circumstances.

11. Landlord and tenant 🔑180(3)

In action by optometrist for wrongful eviction from space leased in department store for optical department, evidence *held* not to support award of damages for loss of good will, in absence of showing that loss of business following eviction was caused by the eviction.

12. Appeal and error 🔑1004(1), 1013

Whether defendant has been guilty of oppression, fraud or malice, as ground for award of exemplary damages, is always a question for the trial judge or jury to decide upon evidence. Civ.Code, § 3294.

13. Landlord and tenant 🔑180(3)

In action by optometrist for damages for wrongful eviction from space rented in department store for optical department, evidence *held* to authorize denial of exemplary damages, though acts of store's employees in connection with the eviction were somewhat extreme. Civ.Code, § 3294.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Lawrence G. Beckett against the City of Paris Dry Goods Company, for damages for unlawful eviction. From a judgment for plaintiff, both parties appeal.

Modified and, as modified, affirmed.

For prior opinion, see 91 P.2d 205.

Dinkelspiel & Dinkelspiel and David K. Lener, all of San Francisco, for plaintiff.

Dean Cunha, Daniel R. Shoemaker, and Harry I. Stafford, all of San Francisco, for defendant City of Paris Dry Goods Co.

EDMONDS, Justice.

In this case, the court is called upon to determine whether a contract made by the parties is a lease or only a license to occupy certain property. The plaintiff recovered damages for unlawful eviction, but the trial judge refused to allow certain amounts claimed and each of the parties has appealed from the judgment.

The defendant agreed in writing with the plaintiff, who is an optometrist, that the latter might, for a period of three years, conduct a first-class optical department in its large store. The space to be occupied at any time was to be designated by the defendant, which was to supply all light, heat, water, telephone and elevator service. Dr. Beckett agreed to furnish equipment, fixtures and show cases conforming in style and finish with those used in the store, and to pay it twenty per cent of his total monthly sales as consideration for the right to do business upon the conditions stated. It was further stipulated that all money taken in by Dr. Beckett should be deposited with the cashier of the City of Paris at the end of each day, and that the latter would later render a statement to him showing the balance of his account after deduction of amounts chargeable to him for rental, advertising, and uncollectible bills.

By the terms of the contract Dr. Beckett was required to purchase merchandise in his own name and upon his own credit, and he agreed to provide liability insurance indemnifying the store against liability arising because of his negligence or that of his employees. Other provisions are that he "cannot assign this lease or any interest therein" without the written consent of the dry goods company and that "on the last day of the term created hereby", he will "forthwith quietly and peaceably surrender and yield up onto the * * * [department store] any occupied premises".

Following the execution of this agreement, Dr. Beckett took possession of several rooms designated by the City of Paris and occupied them for more than two years. The store then notified him that it was cancelling the agreement because of asserted violation of the provision requiring the deposit of receipts with its cashier, and it requested that he vacate on the evening of December 7th. This date was later postponed for three weeks, but immediately thereafter all of the plaintiff's instruments and merchandise were taken out of his rooms and he was excluded therefrom.

The department store contends that its agreement gave Dr. Beckett only a license to use the premises, and that the contract could, therefore, be terminated for just cause at any time. In support of its position, the defendant points out that no definite space was set apart for Dr. Beckett to occupy, and that it was given control of his business in matters of advertising policy and the keeping of accounts. By the terms of the contract, Dr. Beckett also agreed to discharge any employee who should "become objectionable" to the store. Under these circumstances, says the City of Paris, it is obvious that the parties intended the optical department to be an integral part of the store which Dr. Beckett had only a license to manage and operate; hence it had the right to terminate that license at any time and to exclude him from the premises.

[1, 2] A lease is both a contract and a conveyance; under such an agreement there are rights and obligations based upon the relationship of landlord and tenant as well as upon the contractual promises. Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 194 P. 1024; Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, Ann.Cas.1916E, 830; Tiffany, Landlord and Tenant, sec. 16. It is well recognized that no particular legal terminology is required in the making of a lease, but it is essential that the instrument show an intention to establish the relationship of landlord and tenant. Baranov v. Scudder, 177 Cal. 458, 170 P. 1122; Morris v. Iden, 23 Cal.App. 388, 138 P. 120.

[3, 4] Although Dr. Beckett agreed to conduct his business in accordance with the policy of the store, to do his billing through the company's office, to discharge employees who were objectionable to the company, and to cooperate in other matters, there are other provisions in the agreement which definitely point to an intention that the relationship between them should be that of lessor and lessee. For example, the agreement provides that "the designated space shall be delivered to second party in good, tenantable condition", and that Dr. Beckett shall have "the sole and exclusive right to conduct the optical department". It also bound Dr. Beckett, in terms common to leases, "to pay as a monthly rental a sum equivalent to twenty per cent (20%) of the total monthly sales of said department". Also, not only do the parties use the term "lease" in their agreement but the provision which forbids assignment without the consent of the department store is not applicable to a license, which is "a personal, revocable, and unassignable permission to do one or more acts on the land of another without possessing any interest therein. * * * A license, because it is personal, is incapable of being assigned by the licensee". Eastman v. Piper, 68 Cal.App. 554, 229 P. 1002, 1004.

[5] Moreover, throughout the whole instrument, rights are given and language is used which definitely indicates that a lease was intended. The phrases "good, tenantable condition", "cannot assign this lease", "space demised", and "monthly rental" are the terminology of a lease. The use of these words is not conclusive of intention (Morris v. Iden, supra) but strongly indicates that the parties contemplated such a relationship. Nor does the retention by the store of a certain amount of control over the management of the optical department, or the requirement that Dr. Beckett adhere to the rules and regulations governing its operations, negative this intention.

[6, 7] A lease must include a definite description of the property leased and an agreement for rental to be paid at particular times during a specified term. Losson v. Blodgett, 1 Cal.App.2d 13, 36 P.2d 147. Yet, where one goes into possession of premises under a contract containing an ambiguous or uncertain description of property to be occupied and pays the stipulated rent, it will be enforced as a lease if the parties acted upon it as relating to particular premises. Baranov v. Scudder, supra; Merchants' Nat. Bank v. Weston, 34 Cal.App. 693, 168 P. 587.

When the litigants made their contract, they stated only that "the space to be occupied by said [optical] department at any time" was to be designated by the City of Paris, and "shall be delivered to * * * [Dr. Beckett] in good tenantable condition". This provision is not inconsistent with the requirements of a lease and in cases which have arisen under facts strikingly similar to those in the present controversy it has been held that an agreement under which an owner of real property allows another to conduct his own separate business in a stall or section of a store or lot creates the relationship of landlord and tenant rather than licensor and licensee. Herman v. Rohan, 37 Cal.App. 678, 174 P. 349; Smith v. Royal Ins. Co., 9 Cir., 93 F.2d 143; In re Owl Drug Co., D.C., 12 F.Supp. 439.

[8] Both parties agree that if the agreement is a lease, violations of the requirement for all money received to be turned in at the end of each day are not sufficient to justify a forfeiture of it. This is the correct construction of their contract and the plaintiff is, therefore, entitled to recover upon his cause of action for eviction.

[9] Passing to a consideration of the points presented by Dr. Beckett upon his appeal from the judgment, he first challenges the conclusion of the trial judge concerning the amount of his actual damages. It is undisputed that during the year immediately preceding his eviction, his average monthly earnings were $259.61. As he was evicted three months before the expiration of his lease, he is entitled to the sum of $778.83, for loss of profits instead of $666 allowed as actual damages. Also, the defendant does not deny that Dr. Beckett expended $35 for the removal of his furniture and equipment. This sum is recoverable by him. Klein v. Lewis, 41 Cal.App. 463, 182 P. 789.

[10, 11] Another contention of Dr. Beckett is that he is entitled to damages for loss of good will. Although such damages may be recoverable under certain circumstances (Landon v. Hill, 136 Cal. App. 560, 29 P.2d 281; Risdon v. Hotel Savoy Co., 99 Wash. 616, 170 P. 146), there is no evidence in the present case to support an award therefor. Dr. Beckett testified to a loss of business following his eviction but there is nothing to indicate that this decrease was caused by the eviction.

[12, 13] He also urges his right to exemplary damages. However, such damages are recoverable only "where the defendant has been guilty of oppression, fraud, or malice, express or implied" Sec. 3294, Civ.Code), and whether there has been such conduct is always a question for the trial judge or the jury to decide upon the evidence in the particular case. Although the acts of the department store's employees in connection with the eviction of Dr. Beckett were somewhat extreme, a consideration of all the evidence makes the finding that Dr. Beckett should not recover exemplary damages conclusive upon this court.

The judgment is therefore modified by adding the sum of $147.83 to the amount of $666 for which damages were awarded and as so modified the judgment is affirmed, the appellant Lawrence G. Beckett to recover costs on appeal.

We concur: WASTE, C. J.; CARTER, J.; GIBSON, J.; HOUSER, J.; CURTIS, J.; SHENK, J.

---

14 Cal.2d 612

SLEMONS et al. v. PATERSON et al.

S. F. 16310.

Supreme Court of California.

Nov. 17, 1939.

Rehearing Denied Dec. 14, 1939.

1. Mortgages 🔑375

Codal provisions and amendment requiring actions for certain deficiency judgments to be brought within three months after exercise of power of sale were not applicable to sale which took place before their effective dates. Code Civ.Proc. § 337, subd. 1, as amended by St.1933, p. 2116; § 580a.

2. New trial 🔑102(9)

That plaintiffs did not know of defendants' absence from state in four-year period immediately preceding commencement of action for deficiency judgment after exercise of power of sale, and did not know of relevancy of such absence until they had consulted their new attorney after trial of cause, did not constitute a legal excuse for failure to discover and present evidence at the trial, where there was no claim that facts could not have been discovered as well before the trial as after, had plaintiffs been aware of their importance. Code Civ.Proc. § 657.

3. New trial 🔑91

A new trial may not be had on account of mistake of law of a party or his attorney. Code Civ.Proc. § 657.

4. Appeal and error 🔑981
New trial 🔑150(2)

While the granting or denial of a motion for new trial upon the ground of newly discovered evidence is generally within discretion of trial court and such an order will be affirmed unless a clear abuse of discretion is shown, such rule has no application where affidavit or other evidence upon which order is made furnishes no basis for the exercise of such discretion.

5. Appeal and error 🔑981

Order granting new trial because plaintiffs did not learn of defendants' absence from state in four-year period immediately preceding commencement of action for deficiency judgment or relevancy of such absence until consultation with new attorney after judgment against plaintiffs was so lacking in essential basis that it afforded no basis for the exercise of discretion of trial court in granting the motion, and would be reversed. Code Civ.Proc. § 657.

6. New trial ⚷102(9)

That defendants knew the facts relating to their absence from the state in the four-year period immediately preceding commencement of action for deficiency judgment would not excuse plaintiffs from exercising due diligence to procure evidence concerning such absence prior to the trial.

7. New trial ⚷102(9)

It is a matter of public interest that there be an end to litigation and that a new trial should not be granted for the purpose of enabling a party to produce further evidence unless he has shown some legally justified excuse for not having produced such evidence at the former trial. Code Civ.Proc. § 657, subd. 4.

8. New trial ⚷150(4)

Affidavits supporting motion for new trial on account of newly discovered evidence must show that there has been no lack of diligence. Code Civ.Proc. § 657, subd. 4.

9. New trial ⚷150(2)

Parties seeking new trial must file affidavits of persons from whom newly discovered evidence was learned instead of their own affidavits or give a reason for their failure to do so.

◆

In Bank.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Alice M. Slemons and J. W. Slemons, her husband, against Laura C. Paterson and Malcolm G. Paterson, her husband, to recover a deficiency judgment after the sale of property under deed of trust given to secure the balance of the purchase price thereof. From an order granting plaintiffs' motion for new trial, and from an order denying plaintiffs' motion to vacate the new trial order, and from certain other orders made following the new trial order, the plaintiffs appeal.

Order granting a new trial reversed, and appeal from all other orders dismissed.

Prior opinion, 92 P.2d 956.

K. R. McDougall, of Palo Alto, for appellants.

Charles H. Sooy and Charles D. Sooy, both of San Francisco, for respondents.

CARTER, Justice.

This is an appeal by defendants from an order granting plaintiffs' motion for a new trial. While the notice of intention to move for a new trial contains all of the statutory grounds, it appears that the motion was granted solely upon the fifth ground stated in the notice, namely, newly discovered evidence.

The action was brought by plaintiffs on the 26th day of February, 1937, to recover a deficiency judgment after the sale of property under a deed of trust given to secure the balance of the purchase price thereof. The action was commenced four years and twenty-five days after the accelerated maturity of the note, which resulted from the filing for record in the recorder's office of a notice of default on January 31, 1933. The trial court rendered judgment for the defendants, who relied upon the four-year statute of limitations for actions on written instruments. Sec. 337, subd. 1, Code Civ.Proc.

[1] Section 580a of the Code of Civil Procedure, and the 1933 amendment to section 337 of the said code (St.1933, p. 2116), requiring actions for certain deficiency judgments to be brought within three months after the exercise of the power of sale, are not applicable here, since the sale took place before their effective date. Christina v. Hightower, 22 Cal.App.2d 339, 70 P.2d 988; Bank of America Nat. Trust & Savings Ass'n v. Dennison, 8 Cal.App.2d 173, 47 P.2d 296.

In support of their motion for a new trial, plaintiffs filed an affidavit in which they stated that since the trial they had discovered that defendant Malcolm G. Paterson had been absent from the state of California, for a period of more than twelve weeks, and Laura C. Paterson, his wife, for a period of more than forty days during the four-year period from the accelerated maturity date of the note until the commencement of the action, with the result that the action was not barred by the statute of limitations above mentioned. See sec. 351, Code Civ.Proc.

Plaintiffs also stated in their said affidavit that they had been advised by their attorney prior to the commencement of said action that the statute of limitations on their right to sue for a deficiency judgment would not commence to run from the accelerated maturity date of the note, but from the original due date, in which event the action was brought in time. After judgment was entered against them, they changed attorneys. At the direction of their new attorney, they made inquiry and learned from an officer of the corporation by which defendant Malcolm G. Paterson was employed that he had been absent from California for more than twelve weeks during the four-year period immediately preceding the commencement of the action, and from the lessor of defendants' residence, that defendant Laura C. Paterson had been absent from the state of California for more than forty days during said period. Defendant Laura C. Paterson filed a counteraffidavit stating that she had not been absent from the state more than sixteen days during said period, but defendant Malcolm G. Paterson filed no counteraffidavit.

[2, 3] The only reason stated in plaintiffs' affidavit for failing to discover and produce this evidence upon the trial is that they did not know that the Patersons had been absent from the state during said period, and that prior to the time that they consulted their new attorney, neither of the plaintiffs knew of the relevancy of any such absence of defendants. This does not constitute a legal excuse for failure to discover and present the evidence at the trial. Santa Cruz R. P. Co. v. Bowie, 104 Cal. 286, 37 P. 934; Klockenbaum v. Pierson, 22 Cal. 160. Plaintiffs do not claim that they could not have discovered the facts as well before the trial as after, had they been aware of their importance. In Looney v. Scott, 71 Cal.App. 308, 235 P. 76, the excuse given for failure to produce certain testimony at a previous trial, upon motion for a new trial on the ground of newly discovered evidence, was that the defendant was not advised that the testimony was admissible. The court held that the new trial was properly denied. Section 657, Code of Civil Procedure, makes no provision for a new trial on account of mistake of law of a party or his attorney. Santa Cruz R. P. Co. v. Bowie, supra; Le Tourneux v. Gilliss, 1 Cal.App. 546, 82 P. 627; Klockenbaum v. Pierson, supra; Fuller v. Hutchings, 10 Cal. 523, 70 Am.Dec. 746. It seems clear in the case at bar that the plaintiffs' affidavit is, as a matter of law, insufficient to support an order granting a new trial on the ground of newly discovered evidence.

[4, 5] While the granting or denial of a motion for a new trial upon the ground of newly discovered evidence is generally a matter within the discretion of the trial court, and such an order will be affirmed unless a clear abuse of discretion is shown, this rule has no application where the affidavit or other evidence upon which the order is made furnishes no basis for the exercise of such discretion. Such is the situation in the case at bar. The affidavit of plaintiffs is so lacking in essential particulars that it afforded no basis for the exercise of the discretion of the trial court in granting the motion.

[6-8] It is further argued that plaintiffs should not be bound by their failure to produce this evidence at the trial for the reason that the defendants themselves knew the facts relating to their absence from the state during the period in question. This would not excuse plaintiffs from their failure to exercise due diligence to procure the evidence prior to the trial. Butler v. Vassault, 40 Cal. 74. It does not appear from plaintiffs' affidavit that they made any effort whatever to obtain the evidence prior to the trial. If the evidence had been obtained and presented, the issues presented by the pleadings could have been finally determined without further delay or additional expense to the parties. It is a matter of public interest that there be an end to litigation and that a new trial should not be granted for the purpose of enabling a party to produce further evidence unless he has shown some legally justifiable excuse for not having produced such evidence at the former trial. Sec. 657, subd. 4, Code Civ. Proc. The affidavits supporting the motion must show that there has been no lack of diligence. Estate of Cover, 188 Cal. 133, 149, 204 P. 583; People v. Byrne, 160 Cal. 217, 225, 116 P. 521; Maunder v. Pozzo, 175 Cal. 740, 167 P. 145; Smith v. Schwartz, 14 Cal.App.2d 160, 166, 57 P.2d 1386; Vertson v. City of Los Angeles, 116 Cal.App. 114, 119, 2 P.2d 411.

[9] Furthermore, plaintiffs should have filed the affidavit of the employer of defendant Malcolm G. Paterson and of the lessor of defendants' residence, instead of their own affidavit of facts learned from said persons, or have given a reason for their failure to file such affidavits. People v. Neal, 27 Cal.App.2d 655, 81 P.2d 593; Smith v. Schwartz, 14 Cal.App.2d 160, 167, 57 P.2d 1386; Norman v. De Botiller, 95 Cal.App. 336, 272 P. 613; Arnold v. Skaggs, 35 Cal. 684; 1 Cal.Jur. 655.

In view of our conclusion that the order granting plaintiffs' motion for a new trial must be reversed, because of the insufficiency of the affidavit upon which the order granting the motion was based, it becomes unnecessary to consider the other points raised by appellants, or their appeal from the order denying their motion to vacate the new trial order and from certain other orders made following the new trial order. Chase v. Trout, 146 Cal. 350, 372, 80 P. 81. The order granting a new trial is reversed, appellants to recover costs. The appeal from all other orders is dismissed.

We concur: WASTE, C. J.; HOUSER, J.; CURTIS, J.; SHENK, J.; GIBSON, J.; EDMONDS, J.

---

35 Cal.App.2d 508

PRUSSING v. PRUSSING.

Civ. 2413.

District Court of Appeal, Fourth District, California.

Nov. 17, 1939.

1. Appeal and error 🔑907(3)

On appeal on the judgment roll, reviewing court is required to assume that all findings of fact are supported by sufficient material evidence.

2. Mortgages 🔑434, 533

The maker of a note and mortgage and holder of record title to mortgaged premises through mesne conveyances from mortgagor were proper parties to foreclosure proceedings and a judgment against them in the absence of intervening junior lienholder was sufficient to vest title in purchaser at foreclosure sale.

3. Limitation of actions 🔑180(6), 182(5)

The statute of limitations must be affirmatively pleaded, either by demurrer or by answer, or its benefits are waived.

4. Limitation of actions 🔑182(2)

Where neither maker of note nor holder of record title to mortgaged property through mesne conveyances from mortgagor had pleaded the bar of statute of limitations in foreclosure proceedings, limitations would not bar foreclosure unless such plea was interposed.

5. Judgment 🔑629

A judgment in favor of signer of agreement to extend time of payment of note and mortgage did not affect right to prosecute foreclosure action against maker of notes and holder of record title to mortgaged property through mesne conveyances from mortgagor.

6. Mortgages 🔑137

A mortgage is a lien on realty and is not a grant of estate in realty.

7. Executors and administrators 🔑115

Where decedent held mortgage on realty which after his death was acquired by wife who failed to foreclose, wife did not acquire any interest in the mortgage or debt secured by it, but acquired only record title to the property subject to the recorded mortgage, and not having acquired property belonging to the estate, it was not damaged by her act in taking title to mortgaged property subject to the mortgage.

8. Executors and administrators 🔑133

Where wife of decedent acquired title to mortgaged property on which deceased held mortgage, wife could not be held liable to the estate for negligently permitting the statute of limitations to run against right of action to foreclose a mortgage in absence of showing that loss resulted from wife's action.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Peter E. Prussing, administrator with will annexed of the estate of Nicholas F. Prussing, deceased, against Anita Prussing, for damages to the estate by reason of the defendant acquiring title in her own name to property encumbered by a mortgage securing a promissory note owned by decedent and against which defendant permitted the statute of limitations to run without filing foreclosure action. From a judgment for the plaintiff, the defendant appeals.

Reversed.

McFadden & Holden, of Anaheim, and J. P. Guerin, of Los Angeles, for appellant.

Arthur E. Koepsel, of Santa Ana (Sharpless Walker, of Santa Ana, of counsel), for respondent.

MARKS, Justice.

This is an appeal from a judgment against defendant in the sum of $4,500 damages to the estate of Nicholas F. Prussing, deceased, by reason of defendant acquiring title in her own name to property encumbered by a mortgage securing a promissory note dated September 17, 1926, due in three years, in the sum of $6,750, made by Edward M. West and owned by deceased at the time of his death, and by permitting the statute of limitations to run against the obligation without filing a foreclosure action.

[1] The appeal is on the judgment roll. Thus we are required to assume that all findings of fact are supported by sufficient material evidence. It will be necessary for us to detail the facts disclosed by the record with considerable particularity in order to give a proper understanding of the problems before us.

The complaint contains two causes of action. As judgment went in favor of defendant on the first cause of action and as plaintiff has not appealed from that portion of the judgment, no further attention will be given to that phase of the case.

The second cause of action is for damages for fraud in obtaining title to real property for the purpose of defrauding the estate out of its value and for negligence in permitting the statute of limitations to run.

The execution of the promissory note and mortgage and their assignment to deceased are alleged as is the death of Nicholas F. Prussing on January 15, 1932, and the appointment of defendant, his widow, as executrix on February 5, 1932. It is also alleged that she returned an inventory and appraisement of the property of the estate including therein the note and mortgage already mentioned; that she was removed as such executrix on March 20, 1936; that on May 8, 1936, she recorded a deed conveying to herself individually the property described in the mortgage; that she negligently permitted the statute of limitations to run against the note and mortgage on September 17, 1933, without instituting any action to foreclose the mortgage and collect the note; that this was done and title to the mortgaged property was taken by her for the purpose of defrauding the estate out of its value so that she might personally benefit therefrom.

The first amended answer denied the material allegations of the complaint except those formal allegations first mentioned.

Defendant denied that the statute of limitations had been allowed to run against the note and mortgage and plead a written extension agreement dated September 18, 1929, signed by N. F. Prussing and M. R. Cobb, whereby the time for payment of the note was extended for three years to September 17, 1932. This agreement recited that M. R. Cobb "has assumed" the note and that it was made "for and in consideration of the sum of $1.00 paid by each party hereto to the other".

The first amended answer denied any fraud on the part of defendant and alleged that the deed was made to her by mistake and inadvertence. It was also alleged that both before and after the filing of the complaint in this action defendant had offered to restore the property. There is no allegation of a tender of a deed conveying title to the mortgaged property nor is there an offer to convey the property to the estate.

Taking the pleading as a whole it is rather clear that no one would have any great difficulty in concluding that defendant attempted to allege that title to the property was conveyed to her individually by mistake; that she held the legal title to it in trust for the estate; and that she was willing to correct the mistake by conveying the record title to the estate.

A trial was had and findings of fact and conclusions of law and a judgment, interlocutory in its nature, were signed on July 30, 1937.

The trial court found in favor of plaintiff on the major issues. It was particularly found that the extension agreement was a valid and binding contract and extended the time for the payment of the note to September 17, 1932; that "for said reason the statute of limitation has not run against said note and mortgage and the same are not barred by limitation".

The trial judge drew the following conclusions of law from the facts found: that defendant acquired title to the property wrongfully and in violation of her trust and was liable for any damages caused by her breach of trust; that the amount of such damages could not be ascertained until after a foreclosure of the mortgage and a sale of the property and "after it is shown to the court that a deficiency, if any, could and should have been collected from Edward M. West"; that judgment be entered decreeing that plaintiff has been damaged by the acts of defendant; that the amount of such damages, if any, be determined at a subsequent hearing after foreclosure of the mortgage, sale of the mortgaged property, and the determination of the question of the ability of Edward M. West to respond to a deficiency judgment; that the judgment to be immediately entered be final and binding upon the parties "except as to the amount of damages, if any" and that when the amount of damages be ascertained a full and final judgment will be entered "in accordance therewith".

The judgment closely followed the conclusions of law. It contained the following:

"That plaintiff shall proceed with the foreclosure of the mortgage herein referred to upon the above described real property. That said property be sold. That the plaintiff file a certified copy of said judgment and report of sale with the Clerk of the Court. That after the sale of said property and after it is shown to the Court that a deficiency, if any, could and should have been collected from Edward M. West, the plaintiff shall move to have a citation issued against the defendant to show cause why judgment should not be entered against her for such damages, if any, as may be shown.

* * * * * *

"That a present judgment shall be final and binding upon the parties hereto, except as to the amount of damages to be ascertained as aforesaid. When said amount is ascertained, the Court will make a full and final judgment thereon in accordance therewith."

A second findings of fact and conclusions of law and "final judgment" dated September 23 and September 30, 1938, respectively appear in the record. The second findings contain the following:

"In the former proceedings, findings and judgment, the Court purposely refrained from making a definite finding and judgment as to the amount of damages which plaintiff was entitled to for the reason that at said time there was a reasonable probability that the damages as shown in the trial of the action would be increased by foreclosure proceedings then contemplated on the note and mortgage involved in the action. It was the intention of this court to direct the plaintiff to proceed with said foreclosure proceedings and if a deficiency was shown to have been collectible from Edward M. West, the amount of said deficiency, if any, would be added to the damages already shown to have accrued.

"The Court at the conclusion of the former hearing reserved the right to make further and definite findings and judgment as to the actual amount of damages sustained by plaintiff by reason of the unlawful acts of the defendant."

The findings of fact and judgment of July 30, 1937, are copied into and made a part of the second findings.

It is then found that defendant acquired title to the mortgaged property on October 31, 1932, and that the value of the property was then $4,500; that pursuant to the mandate of the former judgment, plaintiff instituted an action in the superior court of Los Angeles county to foreclose the mortgage.

A judgment rendered in that action is then copied into the findings. The action in Los Angeles county to foreclose the mortgage was entitled Peter E. Prussing, as administrator etc. v. Edward M. West, M. R. Cobb, Anita Prussing, and certain fictitious defendants. That judgment recites that defendant M. R. Cobb appeared and demurred to the complaint and moved for judgment on the pleadings. It recites that the trial court was of the opinion that the extension agreement to which we have already referred was "void for want of consideration" and that therefore the cause of action was barred by the statute of limitations. It was adjudged that the demurrer be sustained without leave to amend; that Cobb have judgment on the pleadings; that plaintiff "is hereby denied any and all relief against the defendant M. R. Cobb."

In the instant action the trial court further found that no deficiency judgment was collectible against "Edward M. West or his estate".

A "final judgment" was entered against defendant for $4,500 and costs.

We wish to state that the mere recital of the foregoing facts and the procedure followed in the trial court should not be construed as an approval of that procedure which involved entering an interlocutory judgment in an action at law. A determination of the question thus presented is not necessary for a decision of this case.

It is clear from the record that the trial judge considered defendant liable for the loss to the estate of her husband caused by her taking title to the mortgaged property in her own name and in not securing a deficiency judgment against Edward M. West before the statute of limitations had run in his favor; that the amount of damages could not be fixed before foreclosure of the mortgage and a sale of the mortgaged property; that no damages could or would be assessed before the completion of the sale.

The question of the value of a deficiency judgment against West was settled by the finding that no such judgment could have been collected from him or from his estate.

The matter of the foreclosure of the mortgage and sale of the property is far from settled by the record because all that was settled by the judgment in the superior court of Los Angeles county is that the action to foreclose the mortgage was barred by the statute of limitations in so far as that action affected M. R. Cobb. That action against Edward M. West, the maker of the note, and Anita Prussing, the present holder of the record title to the property, is undetermined and is still pending as far as the record shows. There is nothing in the record to indicate that the mortgage may not be foreclosed and the property yet sold in that action. It does not appear that either of those two defendants have plead the statute of limitations as a bar to the foreclosure action.

[2] The maker of a note and mortgage and the present holder of the record title to the mortgaged property, through mesne conveyances from the mortgagor, are proper parties to a foreclosure proceeding. 18 Cal.Jur., p. 337, sec. 608. A judgment against them (there being no intervening junior lien holder) is sufficient to vest title in the purchaser at foreclosure sale. Title may be passed by a sale in foreclosure proceedings under a decree against the present record owner of the property who took title subject to the mortgage.

[3, 4] "Since * * * the statute of limitations is a personal privilege to be asserted or waived at the option of the one entitled to assert it, the statute must be affirmatively pleaded, either by demurrer or by answer, or its benefits are waived." 16 Cal.Jur., p. 603, sec. 199. As neither Edward M. West nor Anita Prussing have pleaded the bar of the statute, the action may be prosecuted against them at least until such plea be interposed.

[5] The judgment in favor of M. R. Cobb is only a final judgment in so far as it affects the right of the plaintiff to prosecute the foreclosure action against him. It is not an adjudication of plaintiff's right to proceed with the action against the other defendants. 14 Cal.Jur., p. 951, sec. 52. The action as to them is still pending and undecided.

It is clear that the cause of action stated in the complaint is one for damages resulting from (1) negligently permitting "the statute of limitations to run against the right of action to foreclose said mortgage and collect said note" and (2) defendant's fraudulently acquiring property belonging to the estate of deceased while she was acting as executrix.

We may assume negligence on the part of defendant in failing to bring the action to foreclose the mortgage, and still there is nothing to indicate that the estate thus far has suffered any loss by reason of such assumed negligence. A judgment against the maker of the note would have been of no value to the estate because the trial court particularly found that nothing could have been collected from West or his estate. There is nothing to indicate that the mortgage cannot be foreclosed against West and Mrs. Prussing as successfully now as it could have been before the statute had run. Neither West nor defendant has interposed the plea of the bar of the statute in the foreclosure action and until they do so the trial court cannot assume that such a defense might be interposed and the foreclosure defeated. Until it is shown by some competent evidence that the mortgage cannot be foreclosed no loss to the estate by reason of the bar of the statute has been established.

[6] On the record before us there is nothing to indicate that defendant acquired or holds any property belonging to her deceased husband's estate. He held a mortgage on the Los Angeles county property. That mortgage became an asset of his estate. A mortgage is a mere lien on real property and is not a grant of an estate in real property. Alder v. Sargent, 109 Cal. 42, 41 P. 799. It is merely security for a debt or obligation. Johnson v. Razy, 181 Cal. 342, 184 P. 657; 17 Cal.Jur., p. 714 et seq. Deceased did not own the mortgaged property. He merely had a lien upon it.

[7] It is clear from the record that defendant did not acquire any interest in the mortgage or the debt secured by it. She acquired the record title to the property. The mortgage was duly recorded, so she took that title subject to the mortgage (18 Cal.Jur., p. 25, sec. 352), and subject to the liabilities and obligations of the mortgagor,

except his liability to respond to a deficiency judgment. As she acquired no property belonging to the estate it was not damaged by her act in taking the record title to the mortgaged property subject to the mortgage.

[8] It may be that loss to the estate might occur if the defense of the bar of the statute of limitations should be successfully interposed in the pending foreclosure proceedings. It also may be true that if defendant was negligent in permitting that statute to run she might be responsible for the damages resulting from that negligence, if any, on her part, if the bar of the statute is interposed and sustained. There must be proof of such loss before any money judgment can be rendered against her to compensate for injury, if any, to the estate.

As far as the record shows the lien of the mortgage is just as valid and just as much subject to foreclosure now as it was before the record title to the mortgaged property was placed in the name of defendant. Damages cannot be recovered without some proof of loss or injury resulting from the wrongful act or neglect, if any, of a defendant. Here there is neither a finding of any fact nor any inference to be drawn from any finding of fact that the estate of Nicholas F. Prussing has yet suffered any loss, damage or injury from any act or neglect, if any, of defendant. It follows that the findings fail to support the judgment awarding plaintiff damages against defendant.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

WEST KEY NUMBER SYSTEM

35 Cal.App.2d 499

PEOPLE v. CARKEEK.

Cr. 1695.

District Court of Appeal, Third District, California.

Nov. 17, 1939.

1. Burglary 🔑20

An indictment charging the defendant with entry into an "office" with intent to commit theft therein was not defective for failure to use the word "room" instead of "office," since an "office" could be considered to be a "room." Pen.Code, §§ 459, 644.

[Ed. Note.—For other definitions of "Office (Place of Business)" and "Room," see Words & Phrases.]

2. Indictment and Information 🔑114

An indictment charging defendant with being an habitual criminal because of previous criminal convictions was not defective for failure to state particular court in which prior convictions occurred, since habitual criminal act does not so require. Pen.Code, § 644.

3. Criminal law 🔑1202(1)

A party who was in prison pursuant to a conviction but who escaped from prison had served a prison "term" within meaning of habitual criminal act providing that on proof of a party's prior convictions and the serving of a "term" in a state prison, such party should be considered an habitual criminal, since reasonable construction of the word "term" would be any period of time, otherwise, a premium would be placed on the act of escape. Pen.Code, § 644.

[Ed. Note.—For other definitions of "Term," see Words & Phrases.]

4. Criminal law 🔑1023(12)

Generally, a party who has a right to appeal from a judgment or order is not allowed to move to set it aside and then appeal from an order denying such motion. Pen.Code, § 1237, subd. 3.

5. Criminal law 🔑1023(12)

Under provision of Penal Code providing that an appeal may be taken from an order after judgment affecting substantial rights of defendant, Legislature did not intend to give a defendant right to raise any question which might have been raised under an appeal from the final judgment of conviction, and reviewing court has no jurisdiction to entertain an appeal based on such grounds. Pen.Code, § 1237, subd. 3.

6. Criminal law 🔑1023(12)

Under provision of Penal Code providing that an appeal may be taken from an order after judgment affecting substantial rights of a defendant, a judgment which is void either upon its face or by reason of fraud or duress practiced on defendant may be attacked on appeal from such an order. Pen.Code, § 1237, subd. 3.

7. Criminal law ⚬1023(12)

Appellate court lacked jurisdiction to entertain an appeal from the denial of a motion to set aside a judgment of conviction on a charge of burglary and of being an habitual criminal, entered on defendant's plea of guilty, on grounds that information did not charge a public offense or properly charge prior convictions and the serving of a term of imprisonment pursuant to such convictions. Pen.Code §§ 459, 644, 1237, subd. 3.

◆

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Martin Carkeek was convicted of burglary in the second degree and of being an habitual criminal, and he appeals. On motion to dismiss appeal.

Appeal dismissed.

Martin Carkeek, in pro. per.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an appeal from an order denying a motion to set aside a final judgment of conviction of the crime of burglary in the second degree which carried with it an adjudication that appellant was an habitual criminal under the provisions of section 644 of the Penal Code. The appeal is prosecuted under section 1237, subdivision 3, of the Penal Code, which provides that the defendant may appeal "from any order made after judgment, affecting the substantial rights of the party".

An information was filed against appellant, as follows:

"The District Attorney of the County of Tuolumne, State of California, hereby accuses Martin L. Carkeek and Fred Redenbaugh of a felony, to-wit: burglary, in that on or about the 9th day of October, 1938, in the County of Tuolumne, State of California, they did enter the office of Hales and Symons adjacent to the southerly city limit of the City of Sonora, Tuolumne County, State of California, with intent to commit theft therein. That before the commission of the offense hereinabove set forth in this information, the said Martin L. Carkeek was convicted of a felony, to-wit: forgery, and was received at, and confined in Colorado State Penitentiary at Canon City, Colorado, on the 21st day of January, 1930, and did serve a term in said State Penitentiary for said offense. That before the commission of the offense hereinabove set forth in this information, the said Martin L. Carkeek was convicted of a felony, to-wit: grand larceny, and was received at, and confined in Oklahoma State Penitentiary at Macalester, Oklahoma, on June 4th, 1931, and did serve a term in said State Penitentiary for said offense.

"That before the commission of the offense hereinabove set forth in this information, the said Martin L. Carkeek was convicted of a felony, to-wit: burglary, and was received at, and confined in Indiana State Reformatory at Pendleton, Indiana, in February, 1936, and did serve a term in said Reformatory for said offense.

"Dated: October 28th, 1938."

Thereafter, appellant appeared in court and plead guilty to the charge of burglary, which the court found to be of the second degree, and also plead guilty to the prior convictions. He was adjudged to be an habitual criminal, and sentenced to imprisonment in the state prison on November 9, 1938. On August 5, 1939, appellant filed in the superior court a motion to set aside the judgment of conviction upon the following grounds:

1. The information does not charge a public offense; (2) The two prior convictions are not properly charged; (3) The second prior conviction had no term served therefor.

The motion was regularly heard and denied, and this appeal is taken from the order of denial.

It appears that appellant is not lacking in a sense of humor when he sets forth his first ground of appeal in the following language:

"Respondent Attorney General will contend that everyone knows what an 'office' is, and that offices are in buildings. Appellant calls attention to the fact that respondent holds the 'office' of Attorney General, and that recent cases in Kansas City and New Orleans indicate that some politicians enter office with intent to commit theft therein, which entry could certainly not be called burglary. The trial court should have taken judicial notice of the fact that there was nothing before the court to indicate that the 'office' in the information was not a political office, or that it was in any one of the enclosures described in the Burglary Statute. (Pen.Code, sec. 459, cited supra.)"

[1] It might be observed, however, that an entry into a "room" with the necessary intent, makes out a case of burglary under section 459 of the Penal Code, and it might not be too great a strain upon the vernacular to hold that an "office" is a "room".

[2, 3] The second ground is that the designation of the particular court in which prior convictions occurred is not given in the indictment. The statute does not so provide. Also, it is urged that the Habitual Criminal Act (section 644 of the Penal Code), provides not only that the prior conviction must be proved, but that the defendant served a "term" in the state prison of another state. While appellant plead guilty to having been convicted and having served a term upon each of the prior convictions charged, he admitted later, in answer to questions propounded by the trial court, that he escaped from one of the prisons. He urges, therefore, that he did not actually serve a "term". But the legislature does not require that a full term be served, and a reasonable construction of the word would seem to be any period of time, otherwise, a premium would be placed upon the act of escape.

It is contended by the state that the appeal should be dismissed, for the reason that the record shows that this court has no jurisdiction to entertain it. It therefore becomes necessary to determine whether an appeal will lie from every "order made after final judgment, affecting the substantial rights of the party", or whether the legislature intended to restrict the right of appeal to those orders which were not subject to attack under an appeal from the final judgment.

The cases arising in this state appear to be in some confusion, but a close examination of them reveals an attempt to follow a definite rule upon the scope of the code section mentioned. The general rule is thus stated in 8 California Jurisprudence, at page 495:

[4] "Ordinarily a party who has a right to appeal from a judgment or order is not allowed to move to set it aside and then appeal from an order denying his motion." Citing People v. Walker, 132 Cal. 137, 64 P. 133; People v. Mayne, 118 Cal. 516, 50 P. 654, 62 Am.St.Rep. 256.

In the case of People v. Walker, (above), it is said [132 Cal. 137, 64 P. 134]: "Ordinarily, of course, where a party may appeal from a judgment or order, he must appeal direct, and is not allowed to move to set aside, and then appeal from the order denying his motion. But this is only a rule of practice, and it does not apply when the case is such that a direct appeal would afford no relief by reason of the impossibility of securing a record showing the error complained of. Pignaz v. Burnett, 119 Cal. [157], 162, 51 P. 48, and cases cited."

In People v. Brattingham, 91 Cal.App. 527, 267 P. 120, 121, where an appeal was taken from an order denying a motion to modify a final judgment, it was there contended that the trial court was without jurisdiction to include in the sentence a provision that if the fine was not paid, defendant should be imprisoned at the rate of one day for each two dollars of the fine not paid. In dismissing the appeal the court said:

"Appellant contends that an appeal is authorized by subdivision 3 of section 1237 of the Penal Code, which provides that an appeal may be taken from an order after judgment affecting the substantial rights of the defendant. It is also said that the court has inherent power at any time to vacate a void judgment. Generally this is true, but the rule is well established that an order made after judgment is not appealable where the motion merely asks the court to repeat or overrule the former ruling on the same facts. As said in De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, 53 Am.St. Rep. 165, this is so because to permit such an appeal 'would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing contrary to the intent of the statute.' To the same effect are Kent v. Williams, 146 Cal. 3, 79 P. 527, Alpers v. Bliss, 145 Cal. 565, 79 P. 171, and other cases.

"A number of decisions cited by appellant hold that the trial court has jurisdiction to vacate or modify a void judgment, but they do not mention the question here presented; namely, Will an appellate court entertain an appeal from an order made after judgment, where the appeal from the judgment would present precisely the same question, and in every way afford protection to the rights of the defendant? The authorities sustain the contention of the people upon this issue.

"Applying the rule to the record before us, it is apparent that upon an appeal from the judgment alone the judgment roll would contain everything necessary to a determination of the contention of the appellant, and to consider the appeal from the order refusing to modify the judgment would have the effect of allowing the right to two appeals. It is ordered that the appeal be dismissed."

In the case of People v. Van Buren, 134 Cal.App. 206, 25 P.2d 32, 33, an appeal was taken from an order denying a motion to vacate a final judgment of conviction. The court quoted from the Brattingham case (above), and in dismissing the appeal, said:

"It is apparent that the merits of appellant's contention cannot be considered on the hearing of the instant motion. The point here at issue is whether, considering the facts hereinbefore set forth, appellant is entitled to have his contention considered by this court. Not only is it clear that on the original appeal from the judgment appellant might have presented for decision by this court the identical point which he now urges, but also (assuming, but not deciding, the propriety of his first motion to vacate the said judgment) that he might have done so on his appeal from the order by which his motion to vacate the said judgment was denied. In other words, appellant heretofore has had at least one opportunity, and possibly two separate opportunities, to have determined the very point which on his third appeal he now seeks to have decided. If such a course of procedure is in accordance with the law and the practice of the several interested courts, it is manifest that by presenting a single point on his appeal from the judgment against him, in the event that such judgment should be affirmed, the defendant thereafter by successive motions to vacate the judgment, each for a reason differing from either of the others, followed by an appeal from the order in each case by which his said motion was denied, would occupy the attention of the trial court and this tribunal indefinitely. In that regard the authorities of this state appear to be against the position assumed by appellant."

There is a line of cases which hold that an appeal will lie under these circumstances where the judgment is void, and these are relied upon by appellant, although he does not contend that the judgment here is void. In People v. Perez, 9 Cal.App. 265, 98 P. 870, 871, it was allowed, where it was contended that a confession of guilt was obtained through fear and duress. The court states that "a confession of guilt obtained by duress is void and cannot be the basis for a valid judgment". In People v. Schwarz, 201 Cal. 309, 257 P. 71, it was held proper to appeal from an order denying a motion to set aside a judgment of conviction where fraud was practiced by the officers upon the defendant in inducing her to change her plea from not guilty to guilty. A plea obtained by such means would vitiate the entire proceeding. The right to such an appeal has been sustained several times where the record on its face showed that the offense of which the defendant was convicted was barred by the Statute of Limitations, and hence, the judgment was void. See People v. McGee, 1 Cal.2d 611, 36 P.2d 378. None of the contentions made in the foregoing cases is made here. The reason is obvious. The rulings and orders under attack were made by the court in the exercise of its jurisdiction, and at the most are errors which could have been urged upon an appeal from the final judgment.

[5, 6] It is our conclusion that the legislature, in enacting section 1237, subdivision 3 of the Penal Code, did not intend to give a defendant the right to raise any question which might have been raised under an appeal from a final judgment of conviction, and that this court had no jurisdiction to entertain an appeal based upon such grounds. On the other hand, if the judgment is attacked as being void, either upon its face or by reason of fraud or duress practiced upon the defendant, it may be attacked at any time under the provisions of said Statute. This appears to be the rule which may be gleaned from the various cases where such an attack upon a final judgment has been made. To hold otherwise, would, in the language of De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 349, 32 L.R.A. 82, 53 Am.St.Rep. 165 (quoted with approval in People v. Van Buren, 134 Cal.App. 206, 25 P.2d 32, and People v. Brattingham, 91 Cal.App. 527, 267 P. 120) "be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing, con-

trary to the intent of the statute". If the contention of appellant here should prevail, a convicted defendant could wait several years after his trial until the witnesses for the People had died or moved away, and then proceed to make the motion to set aside the judgment. If the appellate court were compelled to treat the appeal with the same force and effect as from the final judgment, and if the conviction was reversed and a new trial ordered, the proper administration of justice would be seriously impaired, if not entirely thwarted. We do not believe that the legislature ever intended to open the doors of our prisons in this manner. The Penal Code definitely fixes the time for an appeal from the judgment. It must be within five days from the rendition of the judgment or order. Pen.Code, sec. 1239. Allowing an appeal from an order denying a motion to set aside or modify the final judgment, where such appeal is based upon errors and rulings which might properly be considered under an appeal from the judgment, would have the effect, in all criminal appeals, of entirely removing the time limitation mentioned. It is unreasonable to believe that such was the legislative intent.

[7] The record shows that this court has no jurisdiction to entertain the appeal, and it is therefore ordered that it be dismissed.

We concur: PULLEN, P. J.; THOMPSON, J.

---

35 Cal.App.2d 507

PEOPLE v. TINDALL.

Cr. 1699.

District Court of Appeal, Third District, California.

Nov. 17, 1939.

1. Indictment and Information 🔑114

An information filed under habitual criminal law charging a defendant with the commission of two prior crimes denominated as "larceny, a felony" was not defective for failure to show whether prior crimes were felonies or misdemeanors, where information alleged that defendant served a term in a state prison on his conviction for such crimes. Pen.Code, §§ 17, 644.

2. Criminal law 🔑1023(12)

Reviewing court lacked jurisdiction to entertain an appeal from the denial of a motion to modify a judgment of conviction, entered on a plea of gulity, to extent of striking out that portion of judgment adjudging defendant to be a habitual criminal. Pen.Code, § 644.

◆

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

A. J. Tindall was convicted of burglary in the second degree and of being a habitual criminal and he appeals. On motion to dismiss appeal.

Appeal dismissed.

A. J. Tindall, in pro. per., and Horace F. Frye, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

Appellant pleaded guilty to the crime of burglary, which the court found to be of the second degree. He also pleaded guilty to three other felonies, and on January 26, 1939, was sentenced under the Habitual Criminal Law (Pen.Code, § 644.) On July 14, 1939, he moved the court to modify the judgment of conviction to the extent of striking out that portion thereof which adjudges him to be an habitual criminal. The motion was denied, and the appeal is taken from the order of denial. The attorney-general now moves to dismiss the appeal for lack of jurisdiction.

[1] The contention made by appellant is that the information charges him with the commission of two prior crimes which are denominated as "larceny", and there is nothing to show whether the crime is a felony or a misdemeanor. It appears, however, that he was charged with the "crime of larceny, a felony", and it is further alleged in the information that he served a term therefor in the state prison in each instance. It would seem that this charges a felony, as "a felony is a crime which is punishable with death or by imprisonment in the state prison". Sec. 17, Pen.Code.

[2] Taking up the motion to dismiss the appeal, the case of People v. Carkeek, Cal.App., 96 P.2d 132, decided this day

by this court, fully disposes of all the contentions made here, and upon authority of that case it is ordered that the appeal be dismissed.

We concur: PULLEN, P. J.; THOMPSON, J.

SAN DIEGO TRUST & SAVINGS BANK et al. v. SAN DIEGO COUNTY et al.*

Civ. 2308.

District Court of Appeal, Fourth District, California.

Nov. 15, 1939.

Hearing Granted Jan. 11, 1940.

1. Fixtures 🔑27(1)

In determining whether article has been so affixed to realty as to become part thereof, general rules are to apply in absence of agreement, but a specific agreement will usually prevail over general rules.

2. Taxation 🔑200

The Legislature in adopting Tax Act for banks providing that tax shall be in lieu of all other taxes "except taxes upon their real property" must be presumed to have had in mind the act regulating banking business which classified property of bank as realty and personalty. Gen.Laws 1937, Act 652, §§ 55, 61, 84; Gen.Laws 1937, Act 8488, §§ 1–3; Const. art. 13, § 16, subd. 1(a).

3. Taxation 🔑200

Under Tax Act for banks providing that tax shall be in lieu of all other taxes "except taxes upon their real property," bank vault doors are not "real property," and hence assessor was properly restrained from assessing vault doors as "real property." Gen.Laws 1937, Act 652, §§ 55, 61, 84; Gen. Laws 1937, Act 8488, §§ 1–3; Pol.Code, § 3617; Civ.Code, § 660; Const. art. 13, § 16, subd. 1(a).

[Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

4. Statutes 🔑245

Tax proceedings are in invitum and tax statutes are to be strictly construed against state.

5. Taxation 🔑200

In absence of specific declaration in Tax Act for banks providing that tax shall be in lieu of all other taxes "except taxes upon their real property," either defining "real property" or limiting "real property" to definition supplied by general statutes, Legislature intended to use words "real property" in limited sense in which such property was designated in act regulating banking business, which had been previously enacted. Gen.Laws 1937, Act 652, §§ 55, 61, 84; Gen.Laws 1937, Act 8488, §§ 1–3; Pol. Code, § 3617; Civ.Code, § 660; Const. art. 13, § 16, subd. 1(a).

6. Taxation 🔑200

In action to restrain county assessor from assessing vaults, vault doors and other equipment of banks as real property, upon theory that such articles were personalty and therefore exempt from local taxation under Tax Act, where it was stipulated that all vaults were realty for purposes of taxation except where relationship of landlord and tenant existed, judgment enjoining assessment of vaults of one of plaintiff banks as realty was not erroneous, notwithstanding evidence that particular bank owned its premises, where there was evidence that at time in question bank was leasing premises and that it later purchased them. Gen. Laws 1937, Act 8488, §§ 1–3.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by the San Diego Trust & Savings Bank and others against the County of San Diego, a quasi municipal corporation, and Crowell D. Eddy, as Assessor of San Diego County, to restrain defendant assessor from assessing vaults, vault doors and other equipment used by plaintiffs in conducting their respective banking businesses as realty. From judgment entered, defendants appeal.

Affirmed.

James B. Abbey, Dist. Atty., and Carroll H. Smith, Deputy Dist. Atty., both of San Diego (Roger J. Traynor, of Berkeley, and Dixwell L. Pierce, Henry C. Ramsey, and George M. Johnson, all of Sacramento, of Counsel), for appellants.

Earl Warren, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., amici curiae in behalf of appellants.

Sanders & La Motte, of San Diego, for respondents.

---

*For subsequent opinion see 105 P.2d 94.

O'Melveny, Tuller & Myers and Louis W. Myers, all of Los Angeles, and Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiae in support of respondents.

BARNARD, Presiding Justice.

The plaintiffs were the owners of certain vaults, vault doors and other equipment, including marble and bronze decorations, iron grill work, cages and counters, all of which were used by them in conducting their respective banking businesses in the city of San Diego. On the first Monday in March, 1938, the county assessor proposed to enter this property upon the tax rolls as improvements and to assess the same as real property. Upon the theory that these articles were personal property and therefore exempt from such local taxation, this action was brought seeking an injunction to restrain the assessor from making the contemplated assessment.

At the opening of the trial it was stipulated that the decision with respect to the vault doors should control as to all other property in question, with the exception of the vaults and an elevator. At the close of the evidence it was further stipulated that the court might find that each of the vaults in question, as distinguished from the vault doors, were real property for the purpose of local taxation "except in those instances where the relationship of landlord and tenant or lessor and lessee exists". The court found in accordance with these stipulations, and further found that the elevator mentioned was real estate for the purpose of local taxation and that all vault doors in question were personal property. As one of its conclusions of law the court found that the classification of "real and personal property" as set forth in section 61 of the Bank Act, Stats.1909, p. 87, as amended; Deering's Gen.Laws, Act 652, was here applicable. Judgment was entered accordingly and this appeal was taken from so much of the judgment as restrains the assessor from assessing any of the property in question as real estate for purposes of local taxation.

In view of the stipulations entered into, the main question presented on this appeal is whether bank vault doors are "real property" within the meaning of that phrase as used in section 3 of the Bank and Corporation Franchise Tax Act, Deering's Gen.Laws, Act 8488, which will be hereinafter referred to as the Tax Act. That section, pursuant to section 16, 1(a) of article XIII of the state Constitution, provides that the franchise tax imposed by sections 1 and 2 of the act shall be "in lieu of all other taxes and licenses, state, county and municipal" upon state and national banks "except taxes upon their real property".

There is practically no conflict in the evidence and the controversy is entirely as to the principles of law which should be applied. It appears from the evidence that the walls, ceilings and floors of the vaults are constructed of heavy reinforced concrete and that a vault door comes anchored in a metal frame, the door and frame constituting one complete unit. The metal frame of the door has flanges at both the front and rear. The opening in the concrete vault is a little larger than the frame proper of the vault door. In installing the door and frame the rear flange is removed from the frame, the door and frame is set in the opening and the rear flange is again screwed to the frame. The door is then leveled and held in place by steel or wooden wedges, and concrete is then poured in between the sides of the vault opening and the door frame to keep the latter rigid. When it is desired to remove the door and frame it is only necessary to remove the inner flange and knock out the concrete wedge, when the whole assembly can be removed without injury to the vault itself. There is also evidence that vault door and frame units are often moved, and are frequently removed, replaced by other doors and the old ones again used in other locations.

The Tax Act imposes a different tax upon banks than that imposed upon other corporations referred to in the act. The franchise tax therein provided for is in lieu of all other taxes except upon real property owned by the banks. What constitutes real property is not defined in that act. The appellants contend that what is real property within the meaning of section 3 of the Tax Act is determined by section 3617 of the Political Code, which makes a general classification of property for the purpose of taxation. That section provides that real estate includes improvements, which in turn includes all structures and fixtures erected upon or affixed to the land. For a definition of fixtures they then turn to section 660 of the Civil Code where these are defined, among other things, as something which is permanently resting upon the land or permanently attached to what is thus permanent. It is argued that these sections of the Political and Civil Codes are alone controlling upon the question before us and that, under the evidence, these vault doors must be held to be improvements, structures and fixtures, and thus assessable as real property.

[1] The question as to whether an article has been so affixed to real property as to become a part thereof usually arises in controversies between landlords and tenants or with respect to the rights of a mortgagee or vendee. In the absence of any agreement the rules applicable in such cases are those laid down in the Civil Code and the questions are largely determined by the manner in which the article is affixed to a portion of the real property and by the intention of the party affixing it, in which regard the matter of permanency is given great weight. Even when, under the general rules, an article is so affixed as to otherwise become an integral part of the premises and where it cannot be removed without affecting or injuring the building an agreement of the parties may prevail and cause it to be treated as personal property. While general rules are to apply in the absence of an agreement a specific agreement usually prevails over general rules. The appellants cite many cases illustrating these principles and applying the general rules under particular circumstances. They especially rely upon Realty Dock & Improvement Corp. v. Anderson, 174 Cal. 672, 164 P. 4, and Southern California Telephone Company v. State Board of Equalization, 12 Cal.2d 127, 82 P.2d 422. In the first of these cases the court was merely interpreting a lease and held that a vault was an addition and improvement within the meaning of a clause providing that additions and improvements should remain upon the property and become the property of the lessor. The other case, which was a tax case, applied the general rules in the absence of any agreement and of any other applicable statute and under peculiar circumstances where both the building and the equipment in question were constructed and installed to be used as a unit for a special purpose and where the building was largely useless for any other purpose.

In the instant case we have, in addition to the problem as presented under the general rules and in the absence of any agreement or particular statute, the question as to the effect of certain provisions of the Bank Act upon the tax question here involved. Section 61 of that act reads in part:

"Any savings bank may purchase, hold or sell real or personal property, as follows:

"1. The lot and building in which the business of the bank is carried on; furniture and fixtures, vaults and safe deposit vaults, and boxes and other personal property, such as may be necessary or proper to carry on its banking business; but no savings bank shall hereafter invest an amount exceeding one-half of its paid up capital and surplus in such lot and building, and banking equipment, except with the written consent of the Superintendent of Banks and hereafter, the authority of a two-thirds vote of all the directors shall be necessary to authorize the purchase of such a lot and building, or the construction of such building."

Section 84 reads:

"No commercial bank shall hereafter invest an amount exceeding one-half of its paid-up capital and surplus in the lot and building in which the business of the bank is carried on, furniture and fixtures, vaults and safe-deposit vaults and boxes necessary or proper to carry on its banking business, except with the previous written consent of the superintendent of banks; and hereafter the authority of a two-thirds vote of all the directors shall be necessary to authorize the purchase of such lot and building or the construction of such building."

Section 55 reads in part:

"The terms 'real estate,' or 'real property,' or 'personal property,' when used in this act, shall have the meaning defined in, and shall be construed in accordance with the provisions of Title I of Part I of division second of the Civil Code."

The quoted portion of section 61 and section 84 relate to property which a bank may purchase and "hold" for use in carrying on its business. Section 61 not only distinguishes between the "lot and building" used in the bank's business and the furniture and fixtures, including vaults, but describes the latter as personal property. Section 84 makes a similar distinction between the lot and building and the furniture and fixtures, including vaults, although the latter are not mentioned as personal property. But the distinction between the two classes of property is clearly indicated in section 84 by requiring a two-thirds vote of the directors in purchasing the lot and building. It seems clear that these two sections of the Bank Act intentionally distinguish between the lot and building in which the business is carried on and the furniture and fixtures, including vaults, which the bank is authorized to purchase and hold. The appellants contend that this distinction has no meaning and that the only purpose of these sections is to regulate the amount of the bank's capital which may be invested in the building and equipment. If that were the only purpose, no reason appears for making any distinction between the two classes of property. The Bank Act controls and regulates the manner in which a banking business may be carried on and the sections referred to provide for the acquiring and also for the holding of two distinct classes of property for use in carrying on the business. If the only purpose was to regulate the total amount that might be thus invested there would have been no occasion to distinguish between real and personal property especially since, under general rules, fixtures and vaults might be so installed as to be a part of the realty.

It is significant that while section 55 provides that the terms "real estate" and "real property" are to be defined in accordance with the provisions of the Civil Code, no such provision is made for the term "lot and building". The terms "real estate" and "real property", used in section 55, are found in various other sections of the Bank Act relating to property held by banks other than for business purposes, and naturally the general rules and definitions of the Civil Code would there apply. The term "real property", appearing in the first clause of section 61, clearly applies to real property taken through mortgage or other security as referred to in subdivisions 2 and 3 of that section. But in the quoted portion of subdivision 1 of that section, referring to property used for business purposes, the words "real property" do not appear and reference is made to "the lot and building", these words being much more limited than the general term "real property" used in section 55. A clear distinction is drawn between the lot and building as thus limited and the other property mentioned in the section, including vaults. It seems clear that, in so far as the Bank Act itself is concerned, the bank vaults are treated as personal property as distinguished from real property.

It cannot be doubted that the word "vaults", as used in these sections of the Bank Act, includes vault doors without which a vault would be useless for the banking business, and that within the meaning of and for the purpose of that act a vault door is a part of a vault. While the trial court was governed by the stipulation of the parties that the reinforced concrete portion of certain of the vaults should be considered as real property, this stipulation excluded the vault doors, and we must, therefore, consider the effect of the Bank Act upon the vault doors as a part of the vaults, in spite of the stipulation as to another part of some of those vaults. If the classification made by the Bank Act is here applicable, it applies to the vault doors, and they are personal property.

The distinction made in the Bank Act between what may be held by a bank for the purpose of its business by limiting real property to the lot and building and classifying vaults and what might otherwise be classed as fixtures as personal property is in accord with common sense and common experience. Banking is a highly specialized business which requires the use of vaults, marble decorations and other equipment not ordinarily used in general business. Most of this special equipment is more or less permanently attached to the building in which the business is carried on and under general rules the manner in which they are affixed might suggest that they had become a part of the realty. As a practical matter, however, they are useful only for the business of the bank and are no real improvement to the premises and would have to be removed if the building were to be used for ordinary purposes. They can readily be installed in any building, can be removed without substantial damage to the building itself, and are commonly bought, sold, moved and treated as personal property. As a practical matter they are more in the nature of furniture and removable equipment than of improvements to realty and they are generally so treated for other purposes than taxation. The Bank Act so treats them and, at least for its purposes, classifies them as personal property.

It is not without significance that when these provisions of the Bank Act were adopted the personal property of state banks could be taxed while the personal property of national banks could not be directly taxed, although their real property was subject to local taxation. It may well be that in adopting these provisions of the Bank Act, and in distinguishing between what part of the property used in conducting the business is real property and what personal property, it was desired to avoid any conflict with federal requirements and to lay down rules which might safely be followed. These provisions also enable a bank to make the required reports to both federal and state governments as to what part of the property used in their business is real property and what part is personal property.

[2, 3] The Bank Act was in force for many years before the Tax Act was adopted in 1929. Sections 1 and 2 of the Tax Act impose a tax upon national and state banks measured by their net income. Section 3 of that act provides that this tax shall be in lieu of all other taxes "except taxes upon their real property". Under this provision personal property belonging to banks is not subject to local taxation. The in lieu tax thus imposed upon banks is considerably larger than that imposed upon other corporations covered by that act, presumably because personal property belonging to such other corporations is still subject to local taxation. While under section 3 of the act real property belonging to banks is subject to local taxation, the Tax Act does not define real property in the sense therein used, which omission has led to this controversy. No reason appears why the legislature, in passing the Tax Act, should have intended to refer to real property as defined in general statutes which were designed to apply in the absence of any specific agreement or provision, and to have ignored and intended to exclude from consideration the classification of real and personal property it had already made in the Bank Act passed for the very purpose of regulating the business which was being taxed, and which provided how both kinds of property might be acquired and held. In adopting a special system of taxation for the specialized business of banking the legislature must be presumed to have had in mind its own act regulating how that business could be carried on. In permitting a tax upon bank real estate and providing that the in lieu tax should be a substitute for all other taxes it must have had in mind its own determination of what was real property and what was personal property in the act authorizing the banks to acquire and hold that very property. It is unreasonable to believe that it was the intention of the legislature to refer only to general statutes for a definition of real property and to ignore the very definite definition and classification contained in the act which permitted the banks to carry on the business which was being taxed. Moreover, while sections 61 and 84 of the Bank Act were amended in 1931 after the adoption of the Tax Act, the provisions in question were not changed. We think that in seeking a definition of the words "real property", as used in section 3 of the Tax Act, we must look to the specific provisions of the Bank Act as they modify more general rules and particularly classify vaults as personal property in connection with the particular business there taxed. Under this interpretation the vault doors here in question were not a part of the real property and not subject to local taxation, and the court correctly so held.

[4, 5] The well-established rule that tax proceedings are in invitum and that tax statutes are to be strictly construed against the state is particularly applicable here. The banks are permitted to do business under a statute which authorizes them to purchase and hold certain property as personal property. The state in another act taxes the business thus authorized to be conducted by imposing an in lieu tax on all property other than real property, which tax is considerably larger than that imposed upon other corporations whose personal property is otherwise taxed. In the absence of a specific declaration in the taxing statute, either defining real property or limiting the same to the definition supplied by general statutes, it should be held that in so far as property used in conducting a banking business is concerned they intended to use the word "real property" in the more limited sense in which such property was designated in the Bank Act, under which the business of the banks had long been conducted, and which authorizes them to acquire and hold property in a certain manner.

[6] Under the views above expressed it becomes unnecessary to consider any other points raised, with one exception. The appellants contend that the judgment with respect to vaults owned by one of the respondents is inconsistent with the findings. In accordance with the stipulation, the court found that all the vaults, apart from the doors, were real property for purposes of taxation except where the relationship of landlord and tenant existed. It is argued that the evidence shows that this particular respondent owned the banking premises in question and that notwithstanding this fact the court enjoined the assess-

ment of its vaults as real property. There is evidence that at the time here in question that bank was leasing the premises and that it later purchased the same. No error appears in this connection.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

35 Cal.App.2d 485

VALDEZ v. PERCY et al.

Civ. 11860.

District Court of Appeal, Second District, Division 1, California.

Nov. 17, 1939.

Rehearing Denied Dec. 11, 1939.

Hearing Denied Jan. 15, 1940.

1. Physicians and surgeons 🔑18(9)

In malpractice action against several physicians and surgeons, the granting of a nonsuit as to one of them was proper, where there was no testimony concerning his activities in connection with plaintiff's case, which showed any causal connection between anything he did and plaintiff's injuries.

2. Appeal and error 🔑927(3, 7)

The District Court of Appeal in passing on the validity of orders granting nonsuits and directed verdicts must review the evidence in the light most favorable to plaintiff.

3. Physicians and surgeons 🔑18(9)

In malpractice action, whether plaintiff authorized two surgeons to remove her right breast was for jury under conflicting evidence.

4. Physicians and surgeons 🔑18(9)

In malpractice action, whether a condition arose and was discovered during authorized operation for removal of plaintiff's enlarged axilla gland under her right arm requiring another operation to remove her right breast was a fact question for jury under conflicting evidence.

5. Assault and battery 🔑2

An operation on a person who has not consented to the operation constitutes technical "assault and battery."

[Ed. Note.—For other definitions of "Assault and Battery," see Words & Phrases.]

6. Assault and battery 🔑11

An agreement signed by a patient upon entering hospital consenting to any and all medical and surgical treatments, including operations, vaccinations, and immunizations against disease, which might be deemed advisable by any of the physicians and surgeons of the hospital, does not constitute consent to perform operations other than the one for which the operating surgeons were engaged by patient to perform, unless necessity therefor arises during authorized operation.

7. Physicians and surgeons 🔑16

An agreement signed by a patient upon entering hospital consenting to any and all medical and surgical treatments, including operations, vaccinations, and immunizations against disease, which might be deemed advisable by any of the physicians and surgeons of the hospital, does not absolve the operating physicians of liability for negligence, if any, in performing the authorized operation.

8. Evidence 🔑536

The determinative test on question whether the trial court properly exercised its discretion in permitting a witness to testify as an expert is whether the witness disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury.

9. Evidence 🔑538

A physician whose training, experience, and practice showed that he possessed knowledge of care and treatment usually and ordinarily employed by skilled physicians and surgeons in good standing practicing in the locality of Los Angeles in the treatment of cancer was not disqualified from testifying as an expert in malpractice action, because in his experience he had never been confronted with two laboratory reports, the second of which advised that the first was incorrect.

10. Evidence 🔑538

In malpractice action for alleged negligence in removing plaintiff's right breast, though physician testifying as an expert witness testified that he had discussed the "Percy cautery" operative method originated by one of the defendants, it was not necessary as a prerequisite to his qualifications to testify as an expert that he be familiar with that method.

11. Trial 🔑143

Where the evidence is in conflict, the granting of a motion for a directed verdict is error.

12. Physicians and surgeons ⟹18(8)

In malpractice action for alleged negligence in removing plaintiff's right breast, evidence was insufficient to warrant finding that pathologist who received specimens of tissue through regular hospital routine and made examinations thereof and director in charge of hospital laboratory were negligent in their conduct as pathologists working in laboratory.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Josephine Valdez against James F. Percy and others to recover damages for alleged malpractice. From an adverse judgment, plaintiff appeals.

Judgment affirmed in part, and in other respects judgment reversed and cause remanded for a new trial.

David C. Marcus, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

WHITE, Justice.

This is an action to recover damages for the alleged malpractice on the part of defendants in so carelessly and negligently rendering surgical and medical treatment to plaintiff as to cause her to suffer the loss of her right breast, including the mammary gland, the pectoral muscles of the right side and all the lymphatic glands of the axilla up to and within the clavicle bone of her body, from all of which it was alleged plaintiff suffered serious painful wounds and bodily disfigurement. These allegations were denied by defendants. The case went to trial before a jury, resulting in the granting of a nonsuit as to the defendant Dr. Levi as to all three counts of the complaint; the granting of a nonsuit as to all other defendants on counts 1 and 2; directing a vedict in favor of defendants Drs. Hankins and Percy on count 3, and granting a nonsuit as to defendants Drs. Evans and Kimball on count 3. Plaintiff appeals.

Plaintiff's complaint originally joined the defendants Dr. James F. Percy and Dr. F. D. Hankins with the County of Los Angeles and several fictitious persons, while the defendants Drs. Theodore S. Kimball, Newton Evans and Leo M. Levi were served as fictitious defendants and filed answers. At the inception of the trial plaintiff dismissed the action against the County of Los Angeles and all other defendants, named and fictitious, except as to those above mentioned.

In the interest of clarity, the narration of the factual background surrounding this litigation might best be divided into three parts: (1) a statement of the pre-operative history; (2) the operation proper, and (3) the post-operative diagnosis. This is deemed expedient because the conduct of defendant doctors Percy and Hankins pertains to the operation proper, while the conduct of defendant Drs. Kimball, Evans and Levi pertains to the pathological and microscopic examination of the specimens removed from plaintiff's body during the operation.

[1] It is not denied that the record is barren of any testimony concerning the activities of defendant Dr. Levi in connection with plaintiff's case which showed any causal connection between anything he did and plaintiff's injuries. The evidence disclosing no connection on his part with the case, it follows that the granting of the nonsuit as to him was proper and the judgment predicated thereon must be affirmed. There was no prejudicial error in the rulings of the trial court upon questions propounded to Dr. Levi and to which objections were sustained.

[2] Viewing the evidence in the light most favorable to plaintiff, as we are required to do in passing upon the validity of the orders granting nonsuits and directed verdicts, the record discloses that the plaintiff's husband, who was also a physician, met defendant Dr. Percy at the general hospital in 1933 where plaintiff's husband had gone to see operations and to become familiar with practice therein. During the last days of 1933 and the early part of 1934, plaintiff's husband advised Dr. Percy that the former's wife had an enlarged gland in the right axilla and desired to consult with Dr. Percy. About two weeks later Dr. Valdez brought his wife, the plaintiff herein, to the general hospital for consultation with Dr. Percy, who at that time examined Mrs. Valdez' right and left axilla, the right and left breast, and right and left side of the neck, stating that he found an enlarged gland the size of a small egg in the right axilla, and that this lump should be examined to determine the nature of the tumor. Plaintiff entered the hospital February 27 and was operated on there on March 1, 1934. The record further indicates that upon advising the removal of the gland Dr.

Percy stated that upon its removal it would have to be sent to the laboratory before its character could be determined, but before that was done the case would have to be referred to what is known as the malignancy board at the general hospital. This board consists of eight or nine physicians, to whom cases are referred when there is suspicion of malignancy or carcinoma, commonly known as cancer, for the purpose, as explained by Dr. Percy, of "getting their consensus of opinion as to what should be done". In the instant case the malignancy board, under date of January 31, 1934, upon examination of plaintiff and consideration of her ailment, made a recommendation which we can best epitomize in the following testimony given by defendant Dr. Percy:

"The record shows itself that there was a doubt in the minds of the members of the malignancy board as to the character of that growth, and as a result of that they recommended that she have a biopsy.

"Q. (By Mr. Gilbert) Don't use big words, break that up so we can understand it. A. Excuse me. Cut the tumor out and send it to the laboratory.

"Q. (By Mr. Marcus) That was all that was recommended? A. That was all that was recommended at that time. Well, I think it says more than that. The instructions usually are that if it is malignant to go on with the radical operation.

"Q. Radical operation means to remove the breast? A. Yes, sir."

While there is a conflict in the record as to what transpired on the occasion of the operation, we find substantial evidence to the effect that defendant Dr. Percy, assisted by defendant Dr. Hankins, removed the gland in question, using Dr. Percy's system known as the "Percy cautery", which consists of a knife heated to from 1200 to 1500 degrees Fahrenheit, the heat of which is intended to destroy cancer cells with which it comes in contact. After Dr. Percy, assisted by Dr. Hankins, removed the gland, a specimen thereof was sent to the laboratory for diagnosis. Five or ten minutes thereafter the report came back from the pathologist in the laboratory that the diagnosis was "carcinoma of the breast." Thereupon Drs. Percy and Hankins prepared to remove Mrs. Valdez' right breast. While in conflict, there is evidence that before any act had been done toward removing the breast except the preparatory one of incising the skin to chart the course of the knife when the incision for removal was made, a second report was received from the laboratory, after a pathological examination of the entire mass of tissue, informing the surgeons that there had been a mistake in the first diagnostic report, and that the true diagnosis was "lymphoma, possibly Hodgkins' disease." The surgeons, Percy and Hankins, then proceeded to and did remove Mrs. Valdez' right breast.

The importance of the laboratory test and the measure of guidance it furnishes the operating physician is established by the testimony of defendant Dr. Percy as follows:

"Q. Well, Doctor, the diagnosis of the pathologist in the laboratory was a part of this operation, was it not? A. Absolutely.

"Q. And you depended upon the pathologist to tell you what the article was, did you not, that was sent there? A. What?

"Q. The specimen or the article or the sample that was sent to the laboratory. A. I depended on what?

"Q. On the pathologist to advise you what it was, did you not, Doctor? A. I think I have already stated that. Absolutely, that we had to have this removal of this gland.

"Q. Well you depended upon it for that? A. Absolutely."

Appellant contends that because the defendant Dr. Percy was employed to operate upon the axilla, that when he performed an operation upon another and different part of the body, to-wit, the breast, he and the defendants working with him were guilty of negligence for the reason that no immediate emergency existed which required the removal of the breast; and further, that regardless of any negligence based upon the nature of their employment, defendants were guilty of negligence in removing the breast in the face of the conflicting and consequently unreliable diagnoses received from the pathological laboratory.

It might be well here to state that the evidence indicates that the difference between Hodgkins' disease as referred to in the second pathological report and carcinoma of the breast is that Hodgkins' disease affects the lymph nodes (numerous nodules composed of lymphoid tissue occurring along the course of the lympathic vessels; see American Illustrated Medical Dictionary, 17th Edition), while carcinoma of the breast attacks the glands of the breast; they are two different tissues entirely; but both Hodgkins' disease and carcinoma of the breast are malignant. The evidence also indicates that following the operation the entire breast which had been removed, as well as the axillary glands, were sent to the laboratory for post-operative diagnosis. This post-operative diagnosis did not indicate the existence of carcinoma of the breast.

[3-7] The evidence as to whether the plaintiff authorized the defendant doctors Percy and Hankins to remove her breast was, to say the least, in conflict, and should have been submitted to the jury. Whether a condition arose and was discovered during an authorized operation for the removal of plaintiff's enlarged axilla gland under her right arm, and which condition required another operation to remove her right breast, was also one of fact, in connection with which the testimony was conflicting and should have been determined by the triers of fact. It is firmly established as the law that where a person has been subjected to an operation without his consent such an operation constitutes technical assault and battery. Hively v. Higgs, 120 Or. 588, 253 P. 363, 53 A.L.R. 1052. Respondent contends that the doctors were clothed with authority to perform the operation upon plaintiff's breast by reason of an agreement signed by her and her husband at the time the former entered the hospital, reading in part as follows:

> "The undersigned patient and others hereby consent to any and all of the medical and surgical treatments, including operations, vaccinations, and immunizations against disease, which may be deemed advisable by any of the physicians and surgeons of the Los Angeles County General Hospital, the intention hereof being to grant authority to administer and perform all and singular, any examinations, treatments, operations, diagnostic procedures, vaccinations and immunizations against disease, which may now or during the course of the patient's care as either an in-patient or an out-patient be deemed advisable or necessary. * * *"

However, we do not understand such agreement to constitute a consent to perform operations other than the one for which the operating surgeons were engaged by plaintiff to perform unless necessity therefor arose during the authorized operation as hereinbefore mentioned. And in any event, such an agreement does not absolve the operating physicians of liability for negligence, if any existed, in the performance of such operation.

Upon the question of alleged negligence on the part of defendant doctors Percy and Hankins in the performance of the operation, plaintiff offered testimony in the form of hypothetical questions propounded to a physician and surgeon, objections to which were sustained on the main ground that no proper foundation was laid and the witness was not qualified to answer the interrogatories. These rulings of the trial court are here assigned as error. The expert witness in question testified that he was a licensed physician, graduated from a recognized school of medicine in 1928; specialized in pathology in cancer; worked in pathological laboratories for twelve years; spent two years at the Mayo Clinic in Rochester; was affiliated with the Soiland Clinic at Los Angeles from 1931 to 1937; that he was assistant director of the public health laboratory at the University of North Dakota in 1928 and 1929; that he had treated many cancer cases; that in his experience with pathology in cancer he had examined the tissue in some three to four thousand cases.

[8-10] Conceding that the qualifications of a witness to testify as an expert are matters within the sound discretion of the trial court and that its ruling will not be disturbed on appeal unless a manifest abuse of that discretion is shown (Darling v. Pac. Elec. Ry. Co., 197 Cal. 702, 714, 715, 242 P. 703), nevertheless the determinative test as to whether the trial court properly exercised its discretion is whether the witness disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury. The training, experience and practice of this doctor certainly qualified him as possessing knowledge of the care and treatment usually and ordinarily employed by skilled physicians and surgeons in good standing practicing in the locality of Los Angeles in the treatment of cancer. We cannot agree with respondents that this witness affirmatively disqualified himself because in his experience he had never "had this character of a situation presented to him in any way, shape or form before", or in other words, that he was disqualified from testifying as an expert because in his experience he had never been confronted with two laboratory reports the second of which advised that

the first was incorrect. The very object of the hypothetical question was to show by this witness that when defendant doctors Percy and Hankins proceeded with the removal of plaintiff's breast notwithstanding conflicting reports from the pathologist, they did not exhibit that skill usually and ordinarily employed by physicians and surgeons in the locality in question. To adopt respondent's theory would be to say that a physician was immune from expert testimony in criticism of his methods so long as he adopted operative methods never employed by any other physician in the performance of an operation for the cure of the particular malady in question; this because the practitioner, knowing that no such person could be found to testify against him with regard to such negligence, the injured person would thereby be without remedy. This cannot be the law. Although this witness testified that he had discussed the "Percy cautery" operative method originated by defendant Dr. Percy, it was not a necessary prerequisite to his qualifications to testify as an expert that he be familiar with the so-called "Percy cautery" method. Kershaw v. Tilbury, 214 Cal. 679, 692, 8 P.2d 109. Respondents' objections might affect the weight to be given the expert testimony of the witness, but they cannot avail to disqualify him from testifying.

[11] Although several hypothetical questions were propounded, some of which were vulnerable to objection, we have no hesitancy in saying that the hypothetical question finally propounded (and for the guidance of court and counsel on a retrial we may say that the same appears on pages 658, 659, 660 and 661 of the reporter's transcript) satisfies the test set forth in Hutter v. Hommel, 213 Cal. 677, 680, 3 P.2d 554, and the court should have permitted the same to be answered. Had this testimony been admitted, as it should have been, the evidence would then be in conflict as to the alleged negligence of the operating physicians. It is elementary that when the evidence is in conflict the granting of a motion for a directed verdict is error.

[12] As heretofore stated, the claimed negligence of doctors Kimball and Evans is dependent upon their conduct and actions as pathologists working in the laboratory of the general hospital. Neither was present at or participated in the operation upon plaintiff. Dr. Kimball received the specimens through the regular hospital routine and made the examinations thereof, while Dr. Evans was the director in charge of the laboratory at the hospital. From the evidence it appears that when the first section of the specimen was presented to Dr. Kimball his report was that if the specimen was from the breast of the patient it might be carcinoma of the breast; that he later called for the large piece of tissue from which the previously examined section had been prepared, and it was transmitted to him at the laboratory. When the large specimen was presented to Dr. Kimball an examination disclosed to him that it was not breast tissue, whereupon he sent a message to the surgery department of the hospital to the effect that the tissue originally received not being breast tissue his diagnosis on the first section submitted to him could not be depended upon so far as any breast malignancy was concerned. There is no evidence that Dr. Kimball was aware that an axilla tumor was being removed from the plaintiff. In fact, it would appear from a reading of the testimony that he did not know what operation was taking place or that any operation was in progress. The record is barren of any testimony warranting either an inference or a conclusion that Dr. Kimball either lacked skill or that he was negligent. The action of the trial court in granting a nonsuit in favor of the defendant doctors Kimball and Evans as to all three counts of the complaint was therefore proper.

What we have herein said renders unnecessary discussion of other points raised by appellant, as the errors complained of are not likely to occur upon a retrial.

For the foregoing reasons, the judgment is affirmed as to defendants Newton Evans, Leo M. Levi, and N. S. Kimball; and as to defendants James F. Percy and F. D. Hankins the judgment is reversed and the cause remanded for a new trial as to such last-named defendants.

We concur: YORK, P. J.; DORAN, J.

MOGLE et al. v. MOORE et al.*

Civ. 2452.

District Court of Appeal, Fourth District,
California.

Nov. 10, 1939.

Hearing Granted Jan. 8, 1940.

1. Appeal and error 🔑907(3)

Where appeal was on the judgment roll, the District Court of Appeal was required to presume that the evidence supported the findings in every particular.

2. Waters and water courses 🔑38

Creek did not lose its character as a "water course" nor did its waters lose their character as stream waters, because stream bed was dry for periods of time, since a constant flow of water is not essential to the existence of a water course, but it is sufficient if, during some seasons, water does in fact flow in the stream bed.

[Ed. Note.—For other definitions of "Water Course," see Words & Phrases.]

3. Waters and water courses 🔑115

"Surface waters" are waters falling on and naturally spreading over lands, and they may come from seasonal rains, melting snows, frosts, or springs, or from all of them.

[Ed. Note.—For other definitions of "Surface Water," see Words & Phrases.]

4. Waters and water courses 🔑115

"Surface waters" consist of surface drainage falling on or flowing from or over a tract or tracts of land before such waters have found their way into a natural watercourse.

5. Waters and water courses 🔑38

A "stream" is a water course having a source and terminus, banks, and channel, through which waters flow at least periodically, and it usually empties into other streams, lakes, or the ocean, but it does not lose its character as a water course even though it may break up and disappear.

[Ed. Note.—For other definitions of "Stream," see Words & Phrases.]

6. Waters and water courses 🔑38

Streams are usually formed by surface waters gathering together in one channel and flowing therein, and the waters then lose their character as surface waters and become "stream waters."

7. Waters and water courses 🔑115

"Flood waters" are distinguished from "surface waters" by the fact that the flood waters have broken away from a stream, while surface waters have not yet become part of a water course.

[Ed. Note.—For other definitions of "Flood Water," see Words & Phrases.]

8. Waters and water courses 🔑38, 115

The term "flood waters" is used to indicate waters which escape from a water course in great volume and flow over adjoining lands in no regular channel, though the fact that such errant waters make for themselves a temporary channel or follow some natural channel, gully, or depression does not affect their character as "flood waters" or give to the course which they follow the character of a natural "water course."

9. Waters and water courses 🔑115

Flood waters escaping from a stream are not "surface waters" and do not lose their character as flood waters while flowing wild over the country.

10. Waters and water courses 🔑115, 118

One has no right to obstruct the flow onto his land of what are technically known as "surface waters," but the term does not include all waters which may be on or moving across the surface of the land without being collected into a natural water course, being confined to waters falling on the land by precipitation or arising thereon in springs.

11. Waters and water courses 🔑115, 118

One has the right to protect himself and his land against "flood water," that is water escaping from a natural water course in time of flood or overflow, and for such purpose may obstruct the flow onto his land, even though such obstruction causes it to flow onto the land of another.

12. Waters and water courses 🔑38, 51, 78

One may not obstruct or divert the flow of a natural water course, "water course" not meaning the gathering of errant waters while passing through a low depression, swale, or gully, but a real stream with definite channel, with bed and banks within which it flows, at the times when the streams of the region habitually flow.

---

*For subsequent opinion see 104 P.2d 785.

13. Waters and water courses ⚬38, 115, 118

A natural channel which extended from canyon, and into which surface waters ran, was a "water course," and the waters flowing in it constituted a "stream," and when the waters left the creek in times of flood and ran wild over the adjacent country, they became "storm waters," and hence landowners had a right to protect themselves from those waters, even though to do so would cause the waters to flow onto the lands of others.

[Ed. Note.—For other definitions of "Storm Waters," see Words & Phrases.]

Appeal from Superior Court, San Bernardino; F. A. Leonard, Judge.

Action by Frank Mogle and Richard Mogle against Oliver B. Moore, Marjorie E. Moore, and others, to restrain the named defendants from protecting their property from overflow of surface waters and from waters which escaped from a water course. From a judgment in favor of the plaintiffs, the named defendants appeal.

Judgment reversed.

Stead & Boileau (by Charles R. Stead), of Pomona, R. Bruce Findlay, of San Bernardino, and Will G. Fields, of San Dimas, for appellants.

James L. King, of San Bernardino, for respondents.

MARKS, Justice.

This is an appeal from a judgment restraining Oliver B. Moore and Marjorie E. Moore, whom we will refer to as the defendants, from protecting their property from overflow from surface waters and from waters which escape from a watercourse known as West Cucamonga creek.

[1] The appeal is on the judgment roll. Under well-settled rules of law we are required to presume that the evidence supports the findings in every particular.

Plaintiffs are owners of two tracts of land lying about seven miles southerly from the city of Upland in San Bernardino county. These parcels of land are separated by a strip of land called "Comet Avenue". Defendants own two parcels of land adjoining plaintiffs' property on the north. These two parcels are also separated by Comet avenue.

Comet avenue is a strip of land twenty feet wide and extends in a northerly and southerly direction. We are not informed as to the location of its termini. From the findings we gather that there was no evidence showing it had been either dedicated or accepted as a public street or road.

The country in question here is practically level with a general slope to the southwest from north of the city of Upland to beyond the properties of the parties involved in this controversy. While there are no findings on this point, the following facts are of such common and universal everyday knowledge to people living near to or familiar with the general topography of this country that we may take judicial notice of them. People v. Tossetti, 107 Cal.App. 7, 289 P. 881. A range of mountains extending in a general easterly and westerly direction rises abruptly from the valley floor a few miles north of the city of Upland. Many canyons empty from these mountains in a general southerly direction. The grade of descent of the land southerly is sharp at the base of this range but is reduced as the distance from the mountains increases. Numerous washes, streams and watercourses from the canyons emptying from the mountains extend into and some of them across the valley floor and during periods of heavy rains carry a considerable volume of water. With these general observations we may proceed to a consideration of the findings of fact made by the trial court.

Comet avenue, as it runs between the two parcels of land of defendants, is marked, in its center, with a row of eucalyptus trees. It is unmarked between the lands of plaintiffs and has been cultivated and used by them and their predecessors. The natural surface of Comet avenue has about the same elevation as the abutting property. The trial court found that "there is no natural water channel, ditch or course upon" Comet avenue as it extends between the parcels of land owned by the respective parties hereto.

The rainy season of 1936–1937 commenced in November, 1936, and ended in March, 1937. Between those dates defendants constructed a fence along their property abutting on the west side of Comet avenue. This fence was constructed of "wooden posts and strands of woven and barbed wire" and tended to obstruct the flow of the "surface waters" on Comet avenue "from flowing along the general slope of defendants' land lying west of said fence, by reason of the collection and accumulation of weeds, grass, debris, sand and silt lodging against the same, and diverting the natural flow of said surface water into and along said 'Comet Avenue' and down to and upon the lands of plaintiffs".

The trial court also found that during the rainy season of 1936–1937, surface waters carried onto and deposited upon Comet avenue extending between defendants' parcels of land, and on the east one hundred fifty feet of the north two-thirds of their west parcel, large quantities of sand and silt; that this deposit ranged in depth between one and two feet; that defendants removed this sand and silt from Comet avenue, to the original surface of the ground with a width of from three to five feet, thereby creating an artificial channel in Comet avenue; that through such channel "a large portion of said surface waters flowed to and upon plaintiffs' said land in a manner and at points where it had not theretofore flowed, and carried with it large quantities of sand, silt and debris, depositing the same upon plaintiffs' said land; that said artificial channel or ditch together with said fence obstruction prevented said surface waters from flowing in a south and southwesterly direction across defendants' land along the general slope thereof"; that defendants "threaten to continue to construct, dig and maintain said artificial ditch and channel" so that the "surface waters" would continue to flow to and over defendants' land to their serious damage. The trial court further found that the waters flowing from the channel on Comet avenue over plaintiffs' property were not flood waters; that part of those waters arose upon and came from three named sections of land; that none of those waters were flood waters which arose in the foothills north and east of Upland.

The trial court further found that there had existed since time immemorial in Cucamonga valley a natural creek bed known as West Cucamonga creek which "was a branch or a portion of the creek or stream of water running out of Cucamonga Canyon"; that at all times there was a continuous stream of water in the stream bed flowing out of Cucamonga canyon and that "prior to 1916 a portion of the waters from said stream flowed down through that certain channel known as West Cucamonga Creek."

"That in or about 1916 the waters from the stream flowing out of Cucamonga Canyon were artificially diverted and checked by dams and spread over large areas of land at the foot of the mountains, and that at all times since 1916 by reason of said artificial diversion, the waters of said stream no longer flow into the channel of West Cucamonga Creek, except infrequently in times of storm, and when the waters break over or out of the check dams in said spreading ground, or at such infrequent times as the waters are turned into said channel through flood gates.

"That said channel formerly carrying the waters of said West Cucamonga Creek, now exists upon the surface of the land as it has existed from time immemorial, but that there are no longer waters flowing in said channel, nor has there been since about 1916, except as hereinbefore found, and except after rain periods, at which times a flow of water, originating largely from the rain waters falling on the streets of the City of Upland, and surrounding territory, by natural flow drain into said channel, and at which time said waters accumulate into a large body of water, and flow down through said channel to a point where said channel reaches Comet Avenue, extended north to the property of John G. Clock, which said point is approximately six miles south of the City of Upland and approximately one mile north of the lands of the defendants.

"That at the point where said channel intersects Comet Avenue upon the property of John G. Clock as aforesaid, the said stream originally flowed in a southwesterly direction. That since the year 1926, Comet Avenue, from said point of intersection southerly, has been cleared out and artificial dikes have been constructed from time to time along the sides thereof by the adjacent property owners southerly to the defendants' property, and that by the year 1935, all the waters flowing in said channel flowed directly south along Comet Avenue to the north boundary of the defendants' property which adjoins Schaefer Avenue on the south thereof.

"All of the waters so flowing in said channel, flow in a well-defined body from a point where they enter the said channel at or near the City of Upland, California, to the defendants' property, and that none of the said waters once having reached said channel escape therefrom from the time that they enter therein until they reach the intersection of Comet Avenue and the north line of the defendants' property. All of said waters, except such as are lost by percolation in the stream bed, flow in a continuous stream through said channel as aforesaid to the north line of defendants' said property, where said channel ceases to exist, and such quantities of water as has flowed out of the end of said channel, has continued down Comet Avenue on the surface of the ground, for a short distance south of Schaefer Avenue and then spread out and flow southwesterly across defendants' said property, on the surface of the ground, following the natural slope of his said land.

"That no waters of any appreciable amount enter said stream south of the City of Upland, which said point is approximately six (6) miles distant from the lands of the defendants."

The findings clearly show that West Cucamonga creek is a natural watercourse extending from the mouth of Cucamonga canyon southerly and southwesterly to its intersection with Comet avenue on the John G. Clock property; that during or prior to 1926 its southwesterly course from that point had been obstructed and the stream waters turned south on Comet avenue and that since 1926 Comet avenue has been developed by neighboring property owners into a stream bed one mile long, extending from West Cucamonga creek to the north line of defendants' property; that in 1937 the waters of West Cucamonga creek followed the natural stream bed to Comet avenue, and through Comet avenue to defendants' property where their confinement into a stream of water ended; that they then spread, joining with the surface waters originating on the three named sections, and did the damage complained of.

There is no definite finding or conclusion of law that the waters were surface waters after they left the original stream bed of West Cucamonga creek or the confinement of the channel on Comet avenue, but the trial judge described them as surface waters, and his ultimate decision cannot be rationalized under any theory other than that he reached the conclusion that those waters were all surface waters when they reached the properties of the defendants. The sole question necessary for consideration here is the character of those waters. Were they surface waters, stream waters or flood waters? We are not concerned with vagrant waters as such waters are not mentioned in the findings or in the briefs.

[2] West Cucamonga creek did not lose its character as a watercourse nor did its waters lose their character as stream waters after 1916, because the stream bed was dry for periods of time. Cederburg v. Dutra, 3 Cal.App. 572, 86 P. 838. It is thoroughly established in California that "A constant flow of water is not essential to the existence of a watercourse." 25 Cal.Jur. 1036, and cases cited. It is sufficient if, during some seasons, water does in fact flow in the stream bed.

[3, 4] Surface waters are defined as waters falling upon and naturally spreading over lands. They may come from seasonal rains, melting snows, swamps or springs, or from all of them. Surface waters consist of surface drainage falling on or flowing from and over a tract or tracts of land before such waters have found their way into a natural watercourse. 26 Cal.Jur. 279, and cases cited.

[5, 6] A stream is a watercourse having a source and terminus, banks and channel, through which waters flow, at least periodically. Streams usually empty into other streams, lakes, or the ocean, but a stream does not lose its character as a watercourse even though it may break up and disappear. Hellman, etc., Bank v. Southern Pacific Co., 190 Cal. 626, 214 P. 46. Streams are usually formed by surface waters gathering together in one channel and flowing therein. The waters then lose their character as surface waters and become stream waters. Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 P. 994; Horton v. Goodenough, 184 Cal. 451, 194 P. 34; Gray v. Reclamation District No. 1500, 174 Cal. 622, at page 650, 163 P. 1024. As we have observed, a continuous flow of water is not necessary to constitute a stream and its waters stream waters. San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200.

[7, 8] Flood waters are thus correctly described in 26 California Jurisprudence 280:

"Flood waters are distinguished from surface waters by the fact that the former have broken away from a stream, while the latter have not yet become part of a watercourse. The term 'flood waters' is used to indicate waters which escape from a water course in great volume and flow over adjoining lands in no regular channel, though the fact that such errant waters make for themselves a temporary channel or follow some natural channel, gully or depression does not affect their character as flood waters or give to the course which they follow the character of a natural watercourse."

[9] It is also thoroughly settled that flood waters escaping from a stream are

not surface waters and do not lose their character as flood waters while flowing wild over the country. In Horton v. Goodenough, supra, it was said [184 Cal. 451, 194 P. 37]: "The waters are plainly flood waters breaking out of their channel and running wild, and as such each property owner threatened has the right to protect himself against them as best he can, under the authority of the decisions we have already cited, the most notable of which is Lamb v. Reclamation District [73 Cal. 125, 126, 14 P. 625, 2 Am.St.Rep. 775], supra. The waters are not surface waters in the technical sense, for they have already been gathered into a stream whence they have escaped."

A similar rule is announced in LeBrun v. Richards, 210 Cal. 308, 291 P. 825, 828, 72 A.L.R. 336, with the added remark that "Flood waters are those which escape from a stream or other body of water and overflow the adjacent territory."

[10-12] The rules governing the right to obstruct the flow of the three classes of waters with which we are here concerned are clearly set forth in Horton v. Goodenough, supra, as follows: "First, one has no right to obstruct the flow onto his land of what are technically known as surface waters. Heier v. Krull, 160 Cal. 441, and authorities therein cited at page 444, 117 P. 530. But by 'surface waters' are not meant any waters which may be on or moving across the surface of the land without being collected into a natural watercourse. They are confined to waters falling on the land by precipitation or rising thereon in springs. Putting it conversely, they do not include waters flowing out of a natural watercourse, but which yet were once a part of a stream and have escaped from it, 'flood waters' in other words. McDaniel v. Cummings, 83 Cal. 515, 23 P. 795, 8 L.R.A. 575; Farnham on Waters, § 278. Second, one has the right to protect himself against 'flood waters,' that is, waters of the character last described, and for that purpose to obstruct their flow onto his land, and this even though such obstruction causes the water to flow onto the land of another. Barnes v. Marshall, 68 Cal. 569, 10 P. 115; Lamb v. Reclamation District, 73 Cal. [125] 126, 14 P. 625, 2 Am.St.Rep. 775; De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 39 P. 610, 46 Am.St.Rep. 237; Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am.St.Rep. 169. Third, one may not obstruct or divert the flow of a natural water course. But by a 'water course' is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow. Los Angeles, etc., Ass'n v. Los Angeles, 103 Cal. [461] 466, 37 P. 375; Sanguinetti v. Pock, supra; San Gabriel Valley Country Club v. Los Angeles County [182 Cal. 392] 188 P. 554, [9 A.L.R. 1200]; Simmons v. Winters, 21 Or. 35, 27 P. 7, 28 Am.St.Rep. 727."

[13] When we apply these rules of law to the facts found by the trial court the following conclusions are inevitable: (1) West Cucamonga creek is a watercourse and the water flowing in it constitutes a stream; (2) The surface waters running off from Upland and vicinity become stream waters when they gather in West Cucamonga creek; (3) When the stream waters of West Cucamonga creek leave its watercourse in times of flood they become storm waters; (4) Those waters remain storm waters when running wild over the adjacent country.

It makes no difference in the ultimate decision of this case, on the facts found, whether we do or do not regard the man-made channel on Comet avenue as a part of West Cucamonga creek and a watercourse. The facts found are not sufficient to determine that question. We will therefore assume that it was not a watercourse. The flood waters escaped from the original channel of the West Cucamonga creek at the John G. Clock property. They then became flood waters, the common enemy against which threatened property owners had the right to protect themselves. Those flood waters followed the man-made channel to the lands of defendants. On leaving that man-made channel they remained flood waters. Defendants had the right to protect their property against those flood waters even to the damage of plaintiffs, their lower neighbors. There is no finding that what defendants did to protect their property was improperly done. It follows that in so far as the judgment enjoins defendants from properly protecting their property from the waters escaping from West Cucamonga creek through the channel on Comet avenue, it cannot be sustained.

The trial court, however, found that part of the damage to plaintiffs' property was caused by the obstruction of the flow of the surface waters originating on three named sections. This defendants had no right to do. Switzer v. Yunt, 5 Cal.App.2d 71, 41 P.2d 974. At another trial this phase of the case should be considered under the rules announced in Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am.St.Rep. 169.

Plaintiffs rely on such cases as Thomson v. La Fetra, 180 Cal. 771, 183 P. 152; Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143; Board of Trustees v. Rodley, 38 Cal.App. 563, 177 P. 175; and Jaxon v. Clapp, 45 Cal. App. 214, 187 P. 69. These cases have only to do with the obstruction of the natural flow of surface waters. They cannot be controlling where, as here, we are principally concerned with the flow of flood waters.

Plaintiffs also urge that the waters which flooded their property cannot be classified as flood waters because they did not escape over the banks of West Cucamonga creek during a period of great storms, but, either through an opening at the end of the creek, or through the end of the man-made channel on Comet avenue.

We are not impressed with this argument. As we have already seen, stream waters escaping from the channel of a watercourse during periods of great storms become flood waters. That they cannot fall within any accepted definition of surface waters is clear whether they escape over the stream banks or at the end of the channel. Therefore, they are not surface waters. That they are not stream waters when they leave the channel is fully settled by the cases already cited. By this process of elimination we are forced to the conclusion that the waters which escaped from West Cucamonga creek could have been only flood waters. We are fortified in this conclusion by Sanguinetti v. Pock, supra, where it was held that storm waters which filled a natural swale, not a watercourse, retained the character of flood waters. A property owner may protect his property from overflow from flood waters.

If we understand the effect of the judgment correctly, defendants are permanently restrained from removing the deposit of sand and silt which was precipitated by the storm waters onto Comet avenue and the northeasterly portion of their westerly tract of land thereby raising the natural grade between one and two feet. We know of no rule of law that would sustain such an order preventing property owners from removing such a foreign deposit and restoring the surface of their lands to their natural grades.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

35 Cal.App.2d 410

JANSSEN v. GORDON et al.

Civ. 10815.

District Court of Appeal, First District, Division 1, California.

Nov. 9, 1939.

1. Appeal and error 🔑931(1)

On defendants' appeal from judgment for plaintiff, the evidence was read and all reasonable inferences were indulged in favor of the plaintiff.

2. Mortgages 🔑270

In action by assignee of note secured by deed of trust, against payee, as indorser, to recover deficiency after sale under deed of trust, evidence *held* to show that payee signed note as indorser, but that payee did not sign as guarantor.

3. Principal and agent 🔑177(1)

That real estate agent acting in a dual capacity as agent for both parties to exchange transaction knew of change which one party made in the other party's offer, and which agent failed to disclose to the other party, did not operate to charge the other party with knowledge of change, since real estate agent was acting as agent of first party in transmitting the counter offer.

4. Evidence 🔑403

An indorsement by payee of note is contract in writing, and its effect is controlled by the law and cannot be changed by oral agreement of the parties.

5. Bills and notes 🔑396

The presentation of note to makers and giving of notice of dishonor to indorsers are indispensable conditions precedent for maintenance of action against makers and indorsers of secured negotiable note after sale of security to recover deficiency. Civ.Code, §§ 3147, 3151, 3165, 3170, 3265.

6. Bills and notes 🔑396

The liability of indorser of negotiable note is secondary, and he is not liable unless presentment is made and notice of dishonor is given to him. Civ.Code, §§ 3147, 3151, 3165, 3170, 3265.

7. Bills and notes 🔑396

The transfer of note by payee after maturity at a time when it was overdue and interest was delinquent did not relieve transferee of necessity of presenting note for payment and giving notice of dishonor in order to charge payee as indorser.

8. Bills and notes 🔑404(1)

A negotiable note indorsed after maturity becomes a demand note, and indorser is entitled to have note presented for payment and notice of dishonor given him within a reasonable time.

9. Bills and notes 🔑396

In absence of allegation or proof that note was presented for payment or notice of dishonor given indorser, or that such requirements were waived, transferee could not recover from indorser a deficiency after sale under deed of trust securing note.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Clayton R. Janssen against Alfred W. Gordon and Barbara Sutton Gordon, his wife, and Rudolph Brandt and Marguerite A. Brandt, his wife, and others, to recover a deficiency after sale of property under deed of trust. From the judgment, Rudolph Brandt and Marguerite A. Brandt, his wife, appeal.

Reversed.

Thomas, Beedy & Paramore, of San Francisco, for appellants.

William Klein, Klein & Clarke, of San Francisco, for respondent.

PETERS, Presiding Justice.

Rudolph and Marguerite Brandt appeal from a deficiency judgment in the total sum of $2,758.95 rendered against them as the indorsers of a promissory note secured by a deed of trust on certain described real property. The makers of the note, Alfred and Barbara Gordon, were originally made defendants, but were never served with process. The plaintiff elected to proceed against the Brandts alone as the indorsers of the note.

The note which forms the basis of this action was executed by the Gordons in favor of Marguerite Brandt in the sum of $3,500, and is dated May 19, 1933, payable on or before one year from date. This note was secured by a deed of trust and was a renewal note, the original obligation having been incurred in 1926. On October 29, 1934, after maturity and while interest was in default, the note and deed of trust were transferred by the Brandts to Janssen in an exchange transaction. In this transaction Janssen and Mrs. Brandt negotiated through a real estate agent named St. Germain, who acted as agent for and received commissions from both of the negotiating parties. On September 25, 1934, the Brandts signed and delivered to St. Germain a written offer to exchange properties with Janssen. By this offer the Brandts offered to exchange certain real property and the Gordon note for certain real property owned by Janssen. The offer, in reference to the note, provided that the Brandts agreed to "assign and transfer" to Janssen the Gordon note. When this offer was transmitted to Janssen, in the presence of St. Germain, Janssen wrote into the offer, and initialed the following provision: "The first parties agree to indorse and unconditionally guarantee the payment of the aforementioned $3,750.00 note"—the note being for $3,500.00 and the balance representing unpaid interest. Janssen then told St. Germain to take the original offer back to the Brandts and have them initial the insertion, if they agreed thereto. This was never done. The evidence is uncontradicted that St. Germain never submitted to the Brandts the changed offer, and Mrs. Brandt testified she never saw the insertion until the time of trial. Janssen testified, and his good faith in the entire transaction is not questioned, that after making the insertion St. Germain told him that the "deal" had been ratified by the Brandts "with all insertions"; that he asked the agent to bring back an initialed copy; that several days later St. Germain telephoned him to tell him all of the papers were in the title company properly indorsed. Janssen had no conversations directly with Mrs. Brandt until the deal was closed at the title company. St. Germain admitted that the insertion had never been submitted to the Brandts.

At the time the deal was closed at the title company, Janssen, St. Germain, Mrs. Brandt and a Mr. Smitten, a friend and representative of Mrs. Brandt, were present. St. Germain testified that Mrs. Brandt told him she wanted Smitten to handle the closing of the deal; that he then told "Smitten my instructions that the note was to be indorsed by the Brandts"; that whether Mrs. Brandt heard this he could not say; that he told Smitten "that it was requisite that her husband and she indorse the note"; that Smitten asked him if he was sure and he replied he was positive "and he [Smitten] requested Mrs. Brandt to sign it, and she signed it right there at the title company". Mrs. Brandt testified that Smitten was only present for a short time and left before she signed the note; that she signed the note in the belief it was the proper way to assign it to Janssen pursuant to her offer. It was stipulated that if Smitten were called he would testify that he did not discuss the indorsement with anyone and that he left the office before the note was indorsed.

As already stated, the note was in default at the time it was transferred to Janssen. The Gordons failed to pay interest or principal, and, after giving the requisite notice, Janssen caused the property to be sold in April of 1936 under the deed of trust, and purchased the same at such sale for $2,000.00. This action is for the deficiency. It should be mentioned, that, upon the order of the trial court, the property was appraised by the inheritance tax appraiser as of the day of sale at $4,750.00.

[1, 2] Reading all of the evidence, and indulging in all reasonable inferences in favor of respondent, the most that can be said is that Mrs. Brandt, through Smitten, knew that to consummate the deal she had to indorse the note. Her contention that she believed that such indorsement was necessary to transfer the note, and that she did not intend to sign as the indorser of a negotiable instrument cannot be sustained. On the other hand, the contention of respondent that Mrs. Brandt is liable as a guarantor of the note, as well as an indorser, under the terms of the counteroffer, cannot be upheld. There is no evidence that Mrs. Brandt knew of this change in the offer, except in so far as she was required to indorse the note. She neither signed nor initialed this change in the contract.

[3, 4] The fact that St. Germain was acting in a dual capacity as agent for both parties, and that he knew of the change made by Janssen in the offer, cannot serve to charge Mrs. Brandt with such knowledge. In transmitting the counteroffer of Janssen to the Brandts, St. Germain was clearly acting as the agent of Janssen. Janssen cannot take advantage of the failure of the agent to disclose the change made by him to the Brandts. Moreover, the contract between the parties was consummated, and the legal rights of the parties became fixed, at the title insurance company, when the papers were signed and the note indorsed. As was said in Merchants' Nat. Bank v. Bentel, 166 Cal. 473, at page 476, 137 P. 25, 26: "The allegation that the indorsement was intended and accepted as a guaranty must be disregarded. An indorsement by the payee of a promissory note is a contract in writing, and its effect is controlled by the law, and cannot be changed by the oral agreement of the parties."

It should also be mentioned that the complaint is not based on any theory that the Brandts were guarantors of the note. The complaint contains the usual allegations found in an action against the makers and indorsers of a secured promissory note after sale, to recover a deficiency.

[5, 6] The note upon which the action is predicated is negotiable in form. There is no allegation in the complaint or no evidence in the record that the note was ever presented to the makers or that notice of dishonor was given the indorsers. These are indispensable conditions precedent for the maintenance of such an action. The liability of the indorser is secondary. He is not liable unless presentment is made and notice of dishonor given to him. Civ.Code, secs. 3151, 3170, 3147, 3165. To escape the effect of these sections, respondent makes several arguments. It is first urged that because the note was secured by a deed of trust it is non-negotiable. This contention overlooks the effect of the 1923 amendment to section 3265 of the Civil Code. Since that date the section has expressly provided that the negotiability of a note otherwise negotiable in form is not affected by the fact it is secured by a mortgage or deed of trust. To hold the indorsers liable on such a secured note, presentment for payment

and notice of dishonor are indispensable. Bank of America Nat. Trust & Savings Ass'n v. Century, etc., Co., 19 Cal.App.2d 197, 65 P.2d 110.

[7, 8] Respondent's next argument is equally without merit. He urges that presentment for payment and notice of dishonor were not necessary to charge the Brandts as indorsers, because the note here involved was transferred after maturity, at a time when it was overdue and the interest was delinquent. No authority is or can be cited to support such contention. It is well settled that when a negotiable note is indorsed after maturity, the note becomes a demand note, and the indorser is entitled to have it presented for payment and notice of dishonor given him within a reasonable time. The rule is stated as follows in 19 California Jurisprudence, page 891, section 77: "Inasmuch as it is a rule that a note indorsed after maturity is deemed payable on demand, the indorser is entitled exactly to the same rights in regard to presentment and notice as the indorser of any other instrument payable on demand." In 8 Corpus Juris, page 526, section 740, the rule, supported by many authorities, is stated as follows:

> "Although a note is indorsed after it is overdue, the indorser as a rule is entitled to have demand made on the maker within a reasonable time, and it has been said that the only difference between demand as regards indorsers before maturity and indorsers after maturity is as to the time when the demand must be made. This is so, although at the time of the indorsement he knew the maker to be insolvent or at the time of transfer a suit on the note was pending in his name against the maker."

In Beer v. Clifton, 98 Cal. 323, 325, 33 P. 204, 205, 20 L.R.A. 580, 35 Am.St.Rep. 172, the court in holding certain instructions incorrectly stated the law, declared: "They are somewhat conflicting, but they announce the doctrine that the indorser of a note after its maturity is absolutely liable thereon without regard to any right to have a demand made upon the maker and notice to the indorser on non-payment. This is not the law. The indorser of an overdue note has as much right to demand and notice as the indorser of a note before maturity, the only difference being as to the time when the demand and notice must be made and given. This has always been the law and is stated in all the text-books. In Daniel, Neg. Inst. par. 611, the rule is stated in these words: 'When a negotiable instrument is indorsed after maturity, payment must be demanded of the payor within a reasonable time, and notice in the event of a refusal, given to the indorser, in order to charge him, it being regarded as equivalent to one payable on demand.'" See, also, Wills v. Booth, 6 Cal.App. 197, 198, 91 P. 759; 19 Cal.Jur., p. 900, § 84, p. 907, § 88; 10 C.J.S., Bills and Notes, p. 853, § 348, subd. d; Brannon, Negotiable Instrument Law, 6th Ed., p. 852.

[9] As already stated, there is no allegation in the complaint that the note was presented for payment or notice of dishonor given the Brandts, nor is there any evidence on these points, nor is there any allegation or proof that either of these requirements was waived. Under such circumstances the other points raised by the parties require no discussion.

The judgment appealed from is reversed.

We concur: WARD, J.; GOODELL, Justice pro tem.

---

35 Cal.App.2d 741

J. J. FOSTER, etc., Plaintiff and Respondent, v. S. D. CAREY, etc., et al., Defendants and Appellants.

Civ. 2065.

District Court of Appeal, Fourth District, California.

Nov. 21, 1939.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Hickcox & Provence, of El Centro, for appellants.

Hugh S. MacKinnon, of Calexico, for respondent.

PER CURIAM.

This is an appeal from an interim order authorizing the payment of costs and attorney's fees before the trial of the action. A subsequent judgment, which has become final, decided the questions presented on this appeal in favor of the appellants. The parties to this appeal have accordingly stipulated that the order appealed from may be reversed.

The order appealed from is reversed.

---

35 Cal.App.2d 476

WHITFIELD v. DE BRINCAT.

Civ. 10870.

District Court of Appeal, First District,
Division 1, California.

Nov. 17, 1939.

Hearing Denied Jan. 15, 1940.

1. Appeal and error 🔑977(4)

The first order granting new trial on ground of insufficiency of evidence will not be disturbed unless there has been a manifest or unmistakable abuse of discretion.

2. New trial 🔑68

The trial court must grant a new trial if, from all the evidence upon which decision was made, the trial court is convinced that a correct conclusion has not been reached.

3. New trial 🔑72

The trial judge must set aside a verdict at least once if his conviction is that the verdict is contrary to the weight of the evidence, even though the evidence pro and con upon the issues is substantial and conflicting.

4. Appeal and error 🔑1175(5)
New trial 🔑164

Where motion for new trial on insufficiency of evidence to sustain verdict is made, issues involved can be disposed of by trial court or upon appeal after first trial, if insufficiency of evidence is upon a question of law.

5. Jury 🔑31(1)

The constitutional right in certain proceedings to have issues determined by jury is subject to wide discretion of trial court.

6. Evidence 🔑597

While views of jurors returning verdict should be given due weight, their determination is not always the proper conclusion and the only conclusion that will adequately conform to ends of justice.

7. New trial 🔑70, 72

The rule that trial judge should grant new trial when convinced that evidence is insufficient to justify verdict or that weight of evidence is against verdict is a salutary rule for protection of litigants.

8. New trial 🔑78(1)

Under principle that there must be an end to litigation, the question whether new trial for insufficiency of evidence should be granted after second jury has returned a verdict similar to first verdict on substantially the same evidence should be approached with caution.

9. New trial 🔑78(1)

On motion for new trial for insufficiency of evidence to sustain second verdict, trial judge must exercise sound discretion to harmonize the facts and the law.

10. New trial 🔑78(1)

A consideration for the rule that after two or more trials greater caution should be given to a scrutiny of the evidence is whether or not a retrial would result in a different verdict.

11. Appeal and error 🔑1006(1)

On appeal from order granting or denying motion for new trial for insufficiency of evidence, made after two or more trials, appellate court, in determining whether retrial would result in different verdict, can consider the number of trials, whether evidence upon each trial was substantially the same, the number of verdicts, and the similarity of the provisions of each, the orders for new trial and the grounds thereof.

12. New trial 🔑78(1)

Where first verdict awarded affirmative relief for defendant in a small amount, and second verdict assessed substantial award to plaintiff, and third verdict found that neither plaintiff nor defendant should take anything, and evidence was such that verdict for plaintiff or defendant could be upheld, order granting second new trial for insufficiency of evidence was not abuse of discretion.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Albert J. Whitfield against Joseph De Brincat, also known as Joe Debrincat, for injuries sustained in automobile accident. The defendant filed a cross-complaint. From an order granting plaintiff's motion for a new trial, the defendant appeals.

Order affirmed.

John J. Taheny, of San Francisco, for appellant.

Archibald D. McDougall, of Sacramento, and Bronson, Bronson & McKinnon and Paul C. Dana, all of San Francisco, for respondent.

WARD, Justice.

This is an appeal from an order granting plaintiff's motion for a new trial upon the ground of the insufficiency of the evidence to sustain the verdict in an action for damages for personal injuries resulting from an accident on the Skyline boulevard in San Mateo county, two former trials in the action having been had.

The question involved may be stated as follows: When a second new trial is granted the same party for insufficiency of the evidence, is a more positive and affirmative duty placed upon an appellate court to apply a more strict rule of review than upon the first appeal from such an order?

[1-3] The first order granting a new trial on the ground of the insufficiency of the evidence will not be disturbed upon appeal unless there has been a manifest or unmistakable abuse of discretion. Ogando v. Carquinez Grammar School District, 24 Cal.App.2d 567, 75 P.2d 641; Morgan v. Los Angeles Pacific Co., 13 Cal.App. 12, 108 P. 735. If, from all of the evidence upon which the decision was made, the trial court is convinced that a correct conclusion has not been reached, it is the duty of the court to grant a new trial. In Estate of Caspar, 172 Cal. 147, 149, 155 P. 631, 632, the court said: "In this state, though the evidence pro and con upon the issues be substantial and conflicting, it is the duty of the trial judge to set aside a verdict at least once if his conviction is that that verdict is contrary to the weight of the evidence. * * * With the statement that the number of times that a trial judge may so exercise his powers to set aside a verdict in a given case is in many states controlled by statute, as in this state it is not, and that therefore it becomes the duty of the judge to set aside a verdict as often as his conscience is impressed with its injustice, it will suffice upon the general question to cite Clark v. Barney Dumping Co. [C.C.], 109 F. 235; In re Geiser [D.C.], 129 F. 237; Daniels v. Leonard, 105 Ga. 841 (32 S.E. 122); Dethrage v. City of Rome, 125 Ga. 802 (54 S.E. 654); Howard Express Co. v. Wile, 64 Pa. 201; Van Doren v. Wright, 65 Minn. 80, 67 N.W. 668, 68 N.W. 22; Wilkie v. Roosevelt, 3 Johns. Cas. (N.Y.) 206, 2 Am.Dec. 149; Van Blarcom v. Kip, 26 N.J.L. 351; Gibson v. Hill, 23 Tex. 77."

[4-9] If the insufficiency of the evidence is upon a question of law, the issues involved may be disposed of by the trial court or upon appeal after the first trial. Here we are concerned with the insufficiency of the evidence from a factual standpoint. The constitutional right in certain proceedings to have issues determined by a jury is subject to the wide discretion of the trial court. The views of the jurors returning the verdict should be given due weight, but it cannot always be said that the determination so reached is the correct and proper conclusion and the only one that will adequately conform to the ends of justice. The rule, that the trial judge when convinced that the evidence is insufficient to justify the verdict or that the weight of the evidence is against the decision, should grant a new trial, is a salutary one for the protection of litigants. The conclusion of the jury may be incorrect, likewise that of the judge, but if an abuse of discretion appears the injustice may be remedied upon appeal or upon a second trial. If a similar verdict should be returned by a second jury upon substantially the same evidence, such verdict would be a strong indication that the trial judge was incorrect in his conclusion, and, upon the general principle that there must be an end to litigation. (Hogan v. Horsfall, 91 Cal. App. 37, 266 P. 1002) and that litigants should not be harassed and annoyed by prolonged litigation, the question should be approached with caution and greater care exercised in an examination of the evidence upon the theory that a second verdict "furnishes more persuasive reason to assume" that the solution by the jury is correct. Petroff v. Nunes, 136 Cal.App. 416, 419, 29 P.2d 293, 294. However, it still remains the duty of the trial judge to exercise sound discretion to harmonize the facts and the law. In Petroff v. Nunes, supra, 136 Cal.App. at page 419, 29 P.2d at

page 294, the court said: "Both the judge and the jury have their independent functions to perform, subject only to the sound and sensible restrictions of the law. With due respect for the great benefits derived from our jury system, the conscientious and skilled judge, after all, must assume the final responsibility of seeing that all verdicts substantially conform to justice and law."

[10, 11] Among the considerations for the rule that after two or more trials greater care and caution should be given to a scrutiny of the evidence is the one whether or not a retrial would result in a different verdict. In determining this question, an appellate court may consider the number of trials, whether the evidence upon each trial was substantially the same, the number of verdicts and the similarity of the provisions of each, the orders for new trial and the grounds thereof. In the instant case, there have been three trials, each resulting in a verdict. The first awarded affirmative relief for the defendant in a small amount; the second assessed a substantial award to plaintiff; the third jury returned a verdict finding that neither plaintiff nor defendant "take anything." Though the transcript of evidence in each case is not before us, we may assume from the briefs that the evidence was substantially the same, except that in the second trial a witness called by defendant gave certain "surprise testimony." The last verdict is not in conformity with either of the two preceding verdicts, the only similarity among the three being that in the first and third verdicts the defendant prevailed; in one instance he received an award of damages, and in the other, the effect of the verdict was to find for defendant upon plaintiff's complaint, and for the plaintiff and cross-defendant upon defendant's cross-complaint. It should be mentioned also in this connection that each trial was presided over by a different judge. The concurrence of two juries would be quite significant; likewise the concurrence of two judges in disagreement with the laymen's conclusion.

It is the contention of appellant that the opinion on the prior appeal, following the second trial (Whitfield v. Debrincat, 18 Cal.App.2d 730, 738, 64 P.2d 960, 964), stated that the final verdict would probably be for the defendant, and in support of this contention he quotes part of a sentence reading as follows: "* * * one seeking relief upon the grounds of surprise must show what case he can establish in the event of a new trial and that a different result would be reached, favorable to him." The balance of the sentence should have been added: "it cannot be said in the case at bar that the lower court manifestly abused its discretion in holding that such a showing was made." The view of the court in the former appeal is epitomized in 18 Cal.App.2d on page 738, 64 P.2d on page 964, as follows: "The lower court apparently believed that a different result might have been reached, and we cannot say that this conclusion was wholly unfounded."

[12] The evidence in the case at bar presents the oft-repeated happening of two automobiles driving on the same road in opposite directions. An accident occurred; the injured parties claimed damages. Each driver testified that he operated his car on the right side of the road in the direction of his travel. Manifestly, plaintiff or defendant crossed the line designating the approximate "middle of the road." Evidence of physical facts was introduced from which inferences might be drawn that plaintiff or defendant was responsible for the collision. The evidence is such that a verdict for plaintiff or defendant could be upheld, and likewise an order for a new trial in favor of either party.

Under the circumstances presented in the record, we are not prepared to say that the verdict of the jury in this case comes within the category of a verdict similar to that adopted by a former jury upon the same facts, so that it "furnishes more persuasive reason to assume that it is correct." It does not appear from the record that a mere difference of opinion existed between the jury and the judge and that the judge desired simply to enforce "his individual will", or that the judge did not have substantial grounds for granting a new trial. The cases upon which appellant relies are similar to Thomas & Co., Inc., v. Hillis, 70 Wash. 53, 126 P. 62, and Faben v. Muir, 77 Wash. 460, 137 P. 1042. In Petroff v. Nunes, supra, referring to the above-cited cases, the court said, 136 Cal.App. at page 421, 29 P.2d at page 295: "We are not in accord with the principle upon which these cases were determined."

The order granting a new trial is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

35 Cal.App.2d 549

PEOPLE v. MILTON et al.

Civ. 12293.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1939.

1. Eminent domain 🔑195

While an issue in condemnation proceeding as to whether land sought to be condemned for highway purposes is in excess of that needed for contemplated improvements may properly become one for judicial determination, it must be raised by appropriate and adequate pleadings. St. 1935, p. 255, § 104, subd. (b).

2. Eminent domain 🔑255

A general denial in a defendant's answer of allegations contained in complaint filed in condemnation proceeding does not constitute a denial that land sought to be condemned for highway purposes was intended to be used for public purposes so as to entitle defendant to raise such issue on appeal from judgment. St.1935, p. 255, § 104, subd. (b).

3. Eminent domain 🔑68

When the state highway commission adopts a resolution declaring that public interest and necessity require acquisition of certain real property for public improvements, resolution becomes conclusive of such facts recited therein, and may not be disputed in absence of fraud, bad faith, or abuse of discretion. St.1935, p. 255, § 103.

4. Eminent domain 🔑68

In order for a defendant in condemnation proceeding to raise issue as to whether land sought to be condemned for highway purposes is in excess of that needed he must specifically charge fraud, bad faith, or an abuse of discretion of highway commission which has power to determine necessity of commencing eminent domain proceedings. St.1935, p. 255, § 104, subd. (b).

5. Eminent domain 🔑255

A defendant in condemnation proceeding who failed by way of pleadings or evidence to raise issue in lower court as to taking of property in excess of that needed for contemplated public improvements could not for first time raise such issue on appeal. St.1935, p. 255, § 103.

6. Eminent domain 🔑186

In condemnation proceeding, highway commission is not limited in the condemnation of land for highway purposes to only as much land as is delineated on the map set forth as part of the complaint, since amount of land sought to be acquired must be ascertained from averments in the complaint. Code Civ.Proc. § 1244, subd. 4.

7. Eminent domain 🔑317(2)

The statutes regulating the condemnation of land for highway purposes permit the state to take an estate in fee rather than an easement. St.1935, p. 255, § 104, subd. (a).

8. Eminent domain 🔑195, 255

Question whether highway commission in proceeding to condemn land for highway purposes had right to seek a fee-simple title must be raised by appropriate pleadings and evidence in support thereof, and legality of commission's action cannot be challenged for first time on appeal. St.1935, p. 255, § 104, subd. (a).

9. Eminent domain 🔑169

A resolution of highway commission declaring necessity of taking land for highway purposes was not invalid because adopted by a majority vote, since the statute requiring such a resolution to be adopted by a two-thirds vote applies only to irrigation districts, public utility districts, water districts, legislative bodies of counties, and cities or incorporated cities and counties and has no application to condemnation proceedings by highway commission. Code Civ. Proc. § 1241, subd. 2; St.1935, p. 255, § 102.

10. Eminent domain 🔑169

A resolution of the highway commission certifying necessity of taking land for public improvements, which bore certification of assistant secretary of commission, constituted conclusive evidence that commission had complied with statutory provision regulating commencement of eminent domain proceedings. St.1935, p. 255, § 102.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Condemnation proceeding by the People of the state of California, acting by and through the Department of Public Works, against Hildegarde M. Milton, formerly Hildegarde M. Wyche, John G. Milton, the

Title Guarantee & Trust Company, and the West Coast Bond & Mortgage Company. From a judgment, Hildegarde M. Milton appeals.

Affirmed.

Edgar T. Fee, of Los Angeles, for appellant.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, and Clifford D. Good, of San Francisco, for respondent.

WHITE, Justice.

This is an appeal by the defendant, Hildegarde M. Milton, from a decree in a suit involving eminent domain.

The action was commenced by the People of the State of California, acting by and through the Department of Public Works, to condemn a strip of land for highway purposes, extending from a point on State Highway Route, No. 165 near the Los Angeles river in the city of Los Angeles, to a point on State Highway Route No. 161, in the city of Pasadena at Broadway avenue, all in the county of Los Angeles. Appellant owned certain property along the route of the proposed highway described in the pleadings as parcel No. 1 and containing 17,850 square feet.

The cause was tried before a jury. Plaintiff established a prima facie case based on the right of eminent domain, the exhibits in support thereof being received in evidence without objection on the part of the appellant. Thereupon expert testimony was offered by appellant as to the value of her property, after which she rested her case. Thereupon plaintiff produced expert witnesses in rebuttal to establish the value of appellant's property in its entirety, no evidence being offered by either the People or appellant as to any severance damage. Both parties having rested, the court instructed the jury, which after deliberation returned a verdict fixing the value of appellant's property at $5,500.

[1-5] The first ground of appeal advanced by appellant is that certain of her land sought to be condemned was in excess of that needed for the contemplated public improvement and could not be taken without her written consent. It is true that under subdivision (b) of section 104 of the Streets and Highways Code, St.1935, p. 255, whenever it is sought to condemn property for the purpose of exchanging the same for other real property to be used for rights of way, that real property may be acquired for such purposes only when the owner of the property needed for a right of way has agreed in writing to the exchange; but such an issue was not raised or framed in the instant case either by the pleadings or by the evidence at the trial. While such an issue may properly become one for judicial determination, it must be raised by appropriate and adequate pleadings. Appellant's general denial in her answer of the allegations contained in plaintiff's complaint does not constitute a denial that the land was intended to be used for public purposes. People v. Olsen, 109 Cal.App. 523, 531, 293 P. 645. When the state highway commission, as it did in the case at bar, adopts a resolution declaring that public interest and necessity require the acquisition of certain real property for public improvements, that resolution becomes conclusive of such facts recited therein, and the same may not be disputed in the absence of fraud, bad faith, or an abuse of discretion. Sec. 103, Streets and Highways Code, St.1935, p. 255; County of San Mateo v. Coburn, 130 Cal. 631, 63 P. 78, 621; Rindge Co. v. County of Los Angeles, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186; 20 C.J. 626, sec. 112; People v. Olsen, supra. But to raise these issues it is necessary to specifically charge fraud, bad faith, or an abuse of discretion on the part of the highway commission to whom is committed the power of determining the necessity of commencing proceedings in eminent domain. This was not done in the case before us, either by way of pleadings or evidence, and the issue cannot be raised for the first time on appeal. The deficiencies in appellant's answer are set forth in detail at page 531 of 109 Cal.App., at page 648, of 293 P. of People v. Olsen, supra. See, also, People v. Broome, 120 Cal.App. 267, 271, 7 P.2d 757.

[6, 7] Appellant's next ground of appeal is that the only estate which the highway commission could condemn is an easement, and that for only as much as is necessary and delineated upon the map set forth as part of plaintiff's complaint. These claims cannot be upheld. The functions of the map are declared by subdivision 4, section 1244, of the Code of Civil Procedure in the following language: "If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the

action or proceeding." The amount of land sought to be acquired must be ascertained from the averments relating thereto in the complaint. The right of the state to take an estate in fee rather than an easement is unequivocally established by section 104 of the Streets and Highways Code, reading in part as follows:

"The department may acquire, either in fee or in any lesser estate or interest, any real property which it considers necessary for State highway purposes. Real property for such purposes includes, but is not limited to, real property considered necessary for any of the following purposes:

"(a) For rights of way, including those necessary for State highways within cities. * * *"

[8] From a reading of the foregoing it is at once apparent that the cited code section permits the respondent to acquire, either in fee or in any lesser estate or interest, any real property. The question of whether the commission was within its rights in a particular condemnation proceeding in seeking to obtain a fee simple title to property there involved must be raised by appropriate pleadings and evidence in support thereof. The legality of the commission's action cannot be challenged for the first time on appeal.

[9, 10] Finally, appellant challenges the sufficiency and legality of the resolution of necessity, which was received in evidence by stipulation. The resolution in question bore the certification of the assistant secretary of the California Highway Commission that it was a true and correct copy of the original resolution passed by the California Highway Commission at a legal meeting thereof, with "a majority of the members of said commission being present and voting therefor". Appellant bases her claim of insufficiency and illegality of the resolution of necessity upon the noncompliance by the Highway Commission with the terms of section 1241 of the Code of Civil Procedure, subdivision 2 of which requires that such resolution must in certain cases be adopted not by a majority vote, but by a two-thirds vote of the legislative or governing body. Appellant's contention in this regard is without merit. The code section relied upon by her has reference only to irrigation districts, public utility districts, water districts, or legislative bodies of counties, cities and counties, or incorporated cities or towns. The Highway Commission derives its power to condemn for state highway purposes from the provisions of section 102 of the Streets and Highways Code, St.1935, p. 255, which authorize the commencement of proceedings in eminent domain when the commission first adopts a resolution declaring that the public interest and necessity require the proposed improvement. There is no requirement that such a resolution be adopted by a two-thirds vote of the five members of the State Highway Commission. In the case at bar the resolution, duly certified by the assistant secretary of the commission, constituted conclusive evidence that the commission had complied with section 102 of the Streets and Highways Code, and was properly received in evidence.

For the foregoing reasons, the judgment must be and it is affirmed, appellant to recover costs on appeal.

We concur: YORK, P. J.; DORAN, J.

---

35 Cal.App.2d 566

ADJUSTMENT CORPORATION v. HOLLYWOOD HARDWARE & PAINT CO. et al.

Civ. 11852.

District Court of Appeal, Second District, Division 1, California.

Nov. 22, 1939.

1. Appeal and error 🔑523(2)

An affidavit of the trial judge purporting to state facts affecting the judgment but not made a part of the judgment roll could not be considered on appeal on judgment roll alone. Code Civ.Proc. § 670.

2. Appeal and error 🔑519

An oral stipulation to which reference was made in brief, but which was not a part of the judgment roll, could not be considered on appeal, which was presented on the judgment roll alone. Code Civ.Proc. § 670.

3. Appeal and error ⚷907(3)

When an appeal from a judgment is heard upon the judgment roll alone, nothing can be assumed or considered that does not appear upon the face of that roll. Code Civ.Proc. § 670.

4. Appeal and error ⚷907(3)

When an appeal is to be determined upon the judgment roll alone, all intendments will be made in support of the judgment and all proceedings necessary to its validity will be presumed to have been regularly taken. Code Civ.Proc. § 670.

5. Pleading ⚷354(2)

A plaintiff is not entitled to a judgment on the pleadings if the answer denies and thereby presents an issue as to material allegations of complaint.

6. Pleading ⚷354(2)

A plaintiff may test the sufficiency of an answer by motion for judgment on the pleadings and may recover judgment thereby without introduction of any evidence, if complaint states facts sufficient to constitute a cause of action and answer expressly or substantially admits or does not sufficiently deny all the material allegations of the complaint, and sets up no new matter sufficient to defeat the action.

7. Pleading ⚷354(2), 358, 359

A judgment may be rendered on the pleadings if the answer is evasive, frivolous, or sham.

8. Pleading ⚷36(3)

A fact admitted in the answer becomes an established fact for purposes of the action, and at trial plaintiff need not prove such fact, and defendant cannot dispute it, nor can it be overcome even by a contrary finding. Code Civ.Proc. § 462.

9. Appeal and error ⚷907(3)

Where appeal is founded on the judgment roll alone and no evidence is presented to the District Court of Appeal, it must be assumed that every material fact necessary to support the pleadings and judgment was adequately established at the trial. Code Civ.Proc. § 670.

10. Pleading ⚷354(2)

In action by assignee to recover for merchandise, where complaint alleged facts showing an indebtedness, and answer admitted that defendant had not paid all of her indebtedness to plaintiff's assignor, thus presenting an evasive answer which failed to raise issue upon a material allegation, plaintiff's motion for judgment on the pleadings was properly granted, notwithstanding that answer denied each and every allegation of the complaint and amendment thereto. Code Civ.Proc. §§ 462, 670.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by the Adjustment Corporation against the Hollywood Hardware & Paint Company and others to recover for goods, wares, and merchandise. From a judgment for plaintiff, Beatrice M. Stuart appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

L. G. Moore, of Los Angeles, for respondent.

YORK, Presiding Justice.

On May 31, 1935, the respondent, as assignee of the American Wholesale Hardware Company, brought action upon a common count to recover for goods, wares and merchandise furnished and delivered within four years next preceding the commencement of said action at the special instance and request of the defendants, and for which they promised and agreed to pay the sum of $12,201.28. A general and special demurrer to the complaint was sustained with leave to amend, whereupon respondent filed its first amended complaint alleging that said goods, wares and merchandise were furnished and delivered to the defendants within the two years next preceding the commencement of said action. A general demurrer was thereupon interposed by the appellant Beatrice M. Stuart which was overruled; whereupon she filed her answer denying generally and specifically each and every allegation of the "complaint as amended by an amendment thereto", but admitting that she had not paid all of her indebtedness to respondent's assignor.

When the matter came on for trial on August 25, 1937, the court granted respondent's motion for judgment on the pleadings to which appellant interposed no objection or defense, and subsequently judgment was entered in respondent's favor for the sum of $13,371.27. This appeal from said judgment is here presented on the judgment roll alone, upon the ground that for the purposes of the motion (for judgment on the pleadings) the truth of all the denials and allegations in the answer is admitted, and since the answer herein denied all the allegations of the complaint and the amendments thereto, the court erred in granting said motion.

Respondent urges in its brief that the judgment herein appealed from was rendered "under an oral stipulation entered into in open court after discussion of the merits of the case between the respective counsel, and that the attorney for the defendants and appellant further confirmed this oral stipulation and agreement before the filing of the judgment".

In support of this contention, respondent has filed in this court an affidavit of the trial judge which is here made the subject of a motion to strike by appellant, on the ground that it is "incompetent, irrelevant and immaterial and not a part of the record of this case and has not been certified * * * so as to make it a part of the record on appeal".

[1] Since it is true that the affidavit which was filed in this court purporting to state facts affecting the judgment is not a part of the judgment roll and consequently may not be considered on this appeal (Rubenstein v. Bank of America, etc., Association, 29 Cal.App.2d 501, 502, 84 P.2d 1056, citing section 670, Code Civ.Proc.; State Bank of Lansing v. McLaury, 175 Cal. 31, 34, 165 P. 7; E. A. Strout Western Realty Agency, Inc., v. McCloud, 29 Cal. App.2d 400, 84 P.2d 533; 2 Cal.Jur. 526, § 263); the motion of appellant to strike the aforesaid affidavit from the record is granted.

[2-4] Turning to the appeal from the judgment, it is clear that the oral stipulation to which respondent refers in its brief is not a part of the judgment roll and therefore it cannot be considered by this court. "* * * when an appeal from a judgment is heard upon the judgment-roll alone, nothing can be assumed or considered that does not appear upon the face of that roll. If that discloses error, the appellate court can no more assume that it was cured by some matter which does not appear therein, than it can consider matters outside of the roll for the purpose of impeaching the correctness of the judgment. In each case the record must be judged by itself alone. So, also, it has been said that when an appeal is to be determined upon the judgment-roll alone, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken. If the error relied upon to destroy such presumption consists in matters dehors the record, such matters must be brought to the appellate court by bill of exceptions or other appropriate method.

"The rule that matters which are not a part of the judgment-roll will not be reviewed on appeal unless they are presented by bill of exceptions, statement or other record, has been applied to prevent the consideration of many matters, such as * * * motions generally, including a motion for judgment on the pleadings and a notice of such motion * * * stipulations of the parties; * * * a party's consent for the entry of judgment * * *." 2 Cal.Jur., pp. 521, 522, 523, §§ 259, 260, and authorities therein cited.

Looking at the face of the record before this court, it is obvious that it is sufficient in itself to sustain the judgment without the support of the oral stipulation referred to by respondent in its brief.

[5] While it is true, as contended by appellant, that the answer denies generally and specifically each and every allegation of the complaint and the amendment thereto, and it is the rule that a "plaintiff is not entitled to a judgment on the pleadings if the answer denies and thereby presents an issue or issues as to the material allegations of the complaint or any of them" (21 Cal. Jur., pp. 237, 238, § 164, and authorities therein cited); nevertheless, the answer herein also admits that appellant "has not paid all of her indebtedness to plaintiff's assignor". In other words, the complaint alleges facts showing an indebtedness due to respondent's assignor from appellant and that the amount of said indebtedness "is now due and owing" to respondent, but appellant by her express admission "that she has not paid all of her indebtedness to plaintiff's assignor" presents an evasive answer which fails to raise an issue upon a material allegation of the complaint.

[6, 7] "A plaintiff may test the sufficiency of an answer by a motion for judgment on the pleadings, and may thereby recover judgment, without the introduction

of any evidence, if his complaint states facts sufficient to constitute a cause of action, and the answer, as interposed by the defendant * * * neither raises any material issue nor states a defense, i. e., where the answer expressly or substantially admits or does not sufficiently deny all the material allegations of the complaint (Stark v. Hoeft, 205 Cal. 102, 110 [269 P. 1105]), and sets up no new matter which is sufficient to bar or defeat the action. Thus a judgment may be rendered on the pleadings if the answer is evasive, frivolous or sham." 21 Cal.Jur., p. 235, § 164, and authorities there cited, including Felch v. Beaudry, 40 Cal. 439, 443; and Doll v. Good, 38 Cal. 287.)

It is stated in Felch v. Beaudry, supra, that "If a complaint be itself sufficient, there is no question that the plaintiff may apply for judgment on the pleadings, if the defendant has filed an answer which expressly admits the material facts stated in the complaint." Also, it is held in the case of Doll v. Good, supra, that whenever the answer fails to deny any of the material allegations of the complaint in such form as to put the same in issue, the plaintiff is entitled to judgment on the pleadings.

[8] According to the terms of section 462 of the Code of Civil Procedure, a fact admitted in the answer becomes an established fact for the purposes of the action (Welch v. Alcott, 185 Cal. 731, 754, 198 P. 626), and at the trial the plaintiff need not prove such fact and the defendant cannot dispute it, nor can it be overcome even by a contrary finding. Beatty v. Pacific States Savings & Loan Co., 4 Cal.App.2d 692, 698, 41 P.2d 378.

[9, 10] Since this appeal is founded on the judgment roll alone and no evidence is presented to this court, it must be assumed that every material fact necessary to support the pleadings and judgment was adequately established at the trial. Rubenstein v. Bank of America, etc., Ass'n, 29 Cal.App. 2d 501, 502, 84 P.2d 1056, citing Marr v. Southern California Gas Co., 198 Cal. 278, 282, 245 P. 178, and 2 Cal.Jur., p. 525, § 262.

For the reasons given no error was committed by the trial court in granting respondent's motion for judgment on the pleadings.

The judgment is affirmed.

We concur: DORAN, J.; WHITE, J.

---

35 Cal.App.2d 517

PARMELY et al. v. BOONE.

Civ. 11052.

District Court of Appeal, First District,
Division 2, California.
Nov. 20, 1939.

1. Trial 🔑408

A defendant who was present at and participated in trial waived written notice of time and place of trial.

2. Courts 🔑27

Where cause of action within the jurisdiction of the superior court was joined with other causes in each of which the demand was less than $2,000, superior court having jurisdiction of the one cause of action could assume jurisdiction of the other causes.

3. Licenses 🔑39

In action in four counts for money had and received, each involving purported sales of securities in violation of the Securities Act, joinder of the several parties plaintiff was not error where plaintiffs had common interest in subject of action and questions of law and fact were common to all parties. Code Civ.Proc. § 378.

4. Limitation of actions 🔑100(2)

Where action for money had and received was tried on theory that sales of securities to plaintiff were accomplished through defendant's fraud in failing to secure necessary permit and trial court found that defendant's promise to repay sum sued for was implied in law because of failure to obtain necessary permit, and that plaintiff had no knowledge of such failure until within two years prior to commencement of action, action was not barred by limitations. St.1917, p. 673.

5. Licenses 🔑39

Evidence authorized recovery for money had and received on ground that defendant made sales of securities without procuring the necessary permit from the commissioner of corporations. St.1917, p. 673.

6. Licenses 🔑39

In action for money had and received involving purported sales of securities by seller who failed to secure necessary permit seller could not escape liability on the ground that the parties were in pari delicto since buyers may assume that seller has complied with law and are not in pari delicto unless

they connive with seller to violate statute. St.1917, p. 673.

7. Licenses 🔑39

Purchaser of stock may assume that seller has complied with statute requiring seller to procure permit from the commissioner of corporations and purchasers are not in pari delicto unless they are shown to have had full knowledge and to have connived with the seller to violate statute. St. 1917, p. 673.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by W. G. Parmely and others against Pearley P. Boone for money had and received. From an adverse judgment, defendant appeals.

Affirmed.

Morgan J. Doyle and J. Joseph Sullivan, both of San Francisco, for appellant.

Athearn, Chandler & Farmer and Edward G. Chandler, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

The four named plaintiffs sued in one complaint upon four separate causes of action. The nature of each cause of action was that of a common count for money had and received and each involved purported sales of securities in violation of the Corporate Securities Act, St.1917, p. 673. One judgment was entered against defendant Pearley P. Boone, individually, awarding specific amounts to each of the named plaintiffs. This defendant has appealed upon a typewritten record. The appellant has raised six points which we will consider in order.

[1] 1. That he was not served with written notice of time and place of trial. He was present at and participated in the trial and thus waived written notice. Sheldon v. Landwehr, 159 Cal. 778, 782, 116 P. 44; Estate of Wempe, 185 Cal. 557, 563, 197 P. 949; 24 Cal.Jur. 725.

[2] 2. That the trial court was without jurisdiction to entertain the second, third and fourth causes of action because in each the demand was less than two thousand dollars. Jurisdiction of the first cause is conceded. Hence the question is whether the superior court, having jurisdiction of one cause of action, may assume jurisdiction of another otherwise joinable cause of action in which the claim is below the jurisdiction of the superior court. The question is squarely answered in the affirmative in Emery v. Pacific Employers Ins. Co., 8 Cal.2d 663, 668, 67 P.2d 1046, 1049. The court there said: "The two joinable causes of action together constitute the 'case' within the meaning of the jurisdictional provisions, and if the total demand of one of said plaintiffs against the defendant is beyond the jurisdiction of the municipal court, the superior court has jurisdiction of said 'case,' including both causes of action."

[3] 3. That there is a misjoinder of parties plaintiff and of causes of action. Under section 378 of the Code of Civil Procedure it is permissible for several plaintiffs to join in an action when they have a common interest in the subject of the action and the questions of law or fact which would arise are common to all the parties. DeMille v. County of Los Angeles, 25 Cal.App.2d 506, 508, 77 P.2d 905. Akely v. Kinnicutt, 238 N.Y. 466, 144 N.E. 682, is directly in point, and nothing to the contrary has been called to our attention.

[4] 4. That certain of the items for which recovery was given are barred by the statute of limitations. Though the action was one in the nature of a common count for money had and received, it was tried on the theory that the sales to plaintiffs were accomplished through defendant's fraud in his failure to secure the necessary permit from the commissioner of corporations. The trial court found that defendant's promise to repay the sums sued for was implied in law because of his failure to obtain the necessary permit, and that plaintiffs had no knowledge of such failure until within two years prior to the commencement of the action. This finding, which is not here attacked, brings the case within the rule of MacDonald v. Reich & Lievre, Inc., 100 Cal.App. 736, 281 P. 106. See, also, Mary Pickford Company v. Bayly Brothers, Inc., 12 Cal. 2d 501, 525, 86 P.2d 102.

[5] 5. That the evidence does not support the judgment. The appeal is taken on a typewritten transcript, and no part of the evidence is printed. The parties stipulated that no permit was ever secured for the sale of the securities. That a permit was necessary is not disputed. But it is argued that the evidence does not prove

that the transactions took place in California. This may be presumed, or at least inferred, from the admitted facts that the principal place of business of the trust was in San Francisco, that all the meetings of the trustees were held there, and that it was the place of residence of all the parties to the action.

[6, 7] 6. That the parties were in pari delicto. The appellant assumes an unusual condition here—that since he did not know that a permit was necessary, there was no intention on his part to violate the act, hence, the buyers must have known and must have so intended. The settled rule is that purchasers may assume that the other has complied with the law, and that they are not in pari delicto unless, as in Campbell v. Julian Merger Mines, 111 Cal.App. 649, 295 P. 1040, and similar cases, the purchasers are shown to have had full knowledge and to have connived with the seller to violate the act. Here the trial court found that none of the plaintiffs had such knowledge when the purchases were made. For the controlling rule see Randall v. California Land Buyers Syndicate, 217 Cal. 594, 597, 598, 20 P.2d 331, and cases there cited.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

---

35 Cal.App.2d 481

FORBES v. MATTOS et al.

Civ. 11060.

District Court of Appeal, First District,

Division 2, California.

Nov. 17, 1939.

1. Evidence 🔑588

In motorist's action for damages received in collision with truck approaching on three-lane highway and turning in front of automobile, physical facts *held* not to require rejection of testimony that motorist was driving in the center lane as obviously false or inherently improbable.

2. Evidence 🔑588

Whether automobiles collided at an angle or head-on cannot be conclusively determined by an application of the laws regarding rolling bodies.

3. Automobiles 🔑246(58)

In motorist's action for damages received in collision with truck approaching on three-lane highway and turning in front of automobile, wherein evidence indicated that motorist was negligently driving in center lane, court properly refused requested instructions that plaintiff was not bound to assume that truck driver would leave a place of safety and that it is not contributory negligence to fail to look for danger where there is no reason to apprehend it.

4. Appeal and error 🔑928(4)

In absence of record showing to the contrary, reviewing court must assume that instructions objected to by appellant were given at appellant's request.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by J. F. Forbes against M. R. Mattos and others, for damages to automobile caused by collision, wherein named defendant filed answer and cross-complaint. From a judgment for defendants on plaintiff's complaint and for plaintiff on the cross-complaint, plaintiff appeals.

Affirmed.

Harold F. Riede, of San Francisco, for plaintiff, appellant and respondent.

Carl L. Christensen, Jr., and Yale S. Kroloff, both of Oakland, for defendants, respondents and appellants.

STURTEVANT, Justice.

The plaintiff commenced an action to recover damages for injuries to an automobile caused by a collision. In his complaint he made M. R. Mattos, the driver, a defendant, and J. G. Wilkins, the owner, also a defendant. The former filed an answer and cross-complaint. The latter filed an answer. The cross-complaint was answered and the action was tried before a jury on all of the issues made by the pleadings. The jury returned a verdict in favor of the defendants on plaintiff's complaint and in favor of the plaintiff on the defendant's cross-complaint. From the judgment entered thereon plaintiff has appealed.

The accident occurred on the highway at a point about midway between Sausalito and San Rafael. At that point the highway runs practically north and south. It is divided into three lanes. On the west side, twenty or twenty-five feet distant, is a platform used as a milk station. On the morning of February 16, 1938, the neighborhood was covered by a heavy fog. There was testimony that the visibility was about fifty feet. At about 7:45 a. m. the defendant M. R. Mattos drove a milk truck northerly on said road. He had his lights lit and traveled in the easterly lane until about one hundred feet from the milk station and then commenced to cross the center lane to the station. There was testimony that as he drove to the north he was traveling about thirty miles per hour and as he commenced to turn he reduced his speed to about ten miles per hour. There was testimony that before commencing to make the turn he was looking to the north and saw no vehicle approaching. There was also testimony that as he made the turn he had his arm extended giving the statutory signal. When his truck was practically in the center lane the plaintiff approached from the north driving a Lincoln sedan. There was testimony that as he approached the truck he was traveling forty or fifty miles an hour; that he was driving along the center lane and his lights were not lit; and that at a point in the center lane, about opposite the milk station, the truck and sedan collided. There was also testimony that one other vehicle occupied the highway. That car was being driven by Lawrence A. Downing and was traveling behind the truck in the direction of San Rafael. It was so close to the truck that as the truck turned to the left Downing's car passed in the rear at about the time the Lincoln car collided with the truck. He was so close to the collision that milk was splashed on him. The left front end of the Lincoln car struck the truck on its right hand side with such force that the truck was turned facing the south and then the Lincoln car advanced at an angle to the west and came to a stop about twenty feet beyond the truck.

[1, 2] The plaintiff does not controvert the fact that there was evidence supporting the verdict, but he earnestly contends the evidence to the effect that he was driving in the center lane was "so obviously false or so inherently improbable as to require its rejection". That contention he predicates on the following facts and circumstances: (1) the injuries to the plaintiff's car as shown by the estimated repairs to restore his car; (2) that the collision was not head-on; (3) that his car did not approach the Mattos truck going straight toward the latter; (4) that the cars changed their courses in less than one second; (5) the position of the cars after the impact; and (6) that from the physical facts it must be assumed the plaintiff was correct in his testimony wherein he claimed the accident occurred in the west lane. A mere statement of the foregoing specifications shows there was nothing obviously false or inherently improbable in the testimony quoted above. All of the eye-witnesses except the plaintiff stated the facts differently than as claimed by him. Furthermore, the question whether the cars collided as stated above, or head-on, cannot be conclusively determined, as plaintiff contends, by an application of the laws regarding rolling bodies. Corcoran v. Ward, 115 Cal.App. 180, 185, 186, 1 P.2d 455. Bearing in mind that automobiles roll on rubber tires and travel over roads that are not absolutely level plains, it is at once apparent there is no general law that is applicable. We think there is no merit in the point.

In his complaint the plaintiff charged the defendants with negligence. In their pleadings the defendants charged plaintiff with contributory negligence. To the facts hereinabove recited, it may be added that on the trial the plaintiff took the stand as a witness in his own behalf. He described the milk station where the accident happened. He showed it is screened by hills on the north and is not in full view until one passes the hill. He stated he was familiar with traffic conditions at said point, and that drivers slowed down on passing it because of the crossing and recrossing of milk trucks. Later the plaintiff requested the trial court to give these two different instructions:

"You are instructed that the plaintiff, J. F. Forbes, was under no legal duty at the time of the collision and immediately prior thereto to assume that the defendant would leave a place of safety and place the automobile under his control in a situation where it would make a collision unavoidable, when, by using ordinary and common knowledge, said defendant in so going across the highway knew or should have known that a collision would in all probability result."

"You are instructed that under the law it is not contributory negligence to fail to look for danger where there is no reason to apprehend it; in other words, negligence may not be charged to plaintiff when, under the circumstances, he had no reason to apprehend danger."

[3, 4] The trial court refused to give either of them. The second one the trial court marked "covered". In so ruling the trial court did not err. Both were properly refused. Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 232, 28 P.2d 932, and cases there cited. The plaintiff quotes four other "instructions given by the court bearing upon this issue", and contends they did not cover the requested instructions and that each was an incorrect application of the law to the instant case. We find no merit in the contention. As the record does not show to the contrary we must assume the four instructions herein last mentioned were given at the request of the plaintiff. We find that the jury was fully and correctly instructed on all questions of law applicable to the case.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

---

35 Cal.App.2d 521

JENKINS v. HILL.

Civ. 11046.

District Court of Appeal, First District,

Division 2, California.

Nov. 20, 1939.

Hearing Denied Jan. 18, 1940.

1. Appeal and error 🔑173(2)

In action to recover proceeds of life policies against administrator of insured's estate, reviewing court would not consider issue whether plaintiff attempted to evade law requiring insurable interest where such issue was not raised by defendant, and findings of fact negatived existence of any evidence tending to support such issue. St. 1935, p. 636, § 10110.

2. Appeal and error 🔑907(3)

On an appeal on the judgment roll, findings of fact of trial court must be taken as conclusive.

3. Insurance 🔑116(1)

An unmarried woman who agreed to support a man and to pay the expenses of his last illness and burial had an "insurable interest" in his life under the statute defining an insurable interest, since an implied promise to pay for services of woman arose at the time of her promise to perform such services. St.1935, p. 636, § 10110.

[Ed. Note.—For other definitions of "Insurable Interest," see Words & Phrases.]

4. Insurance 🔑117

An insurer is the only party who can raise question of insurable interest, and if insurer waives question of interest and pays money to named beneficiary, or into court, neither personal representative nor creditors can claim proceeds on grounds of beneficiary's lack of insurable interest. St. 1935, p. 636, § 10110.

5. Trusts 🔑30½(1)

Where an unmarried woman who lived with and supported a man was informed that she could not become beneficiary in insurance policies on his life, but that same result could be obtained by a gift of policies to her, after issuance of policy a trust arose in her favor.

6. Appeal and error 🔑909(5)

In action to recover proceeds of life policies against administrator of estate of insured, findings that plaintiff supported insured and paid premiums on policies on his life, that life policies were made payable to estate of insured and then given by insured to plaintiff because it was believed that plaintiff could not be named as beneficiary because lacking an insurable interest, supported judgment for plaintiff as showing either an insurable interest in plaintiff or a case where existence of insurable interest must be presumed in support of judgment because issue could not be raised. St.1935, p. 636, § 10110.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action to recover proceeds of two life policies by Mary Jenkins against Albert E. Hill, administrator of the estate of Richard McAfee. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., and Owen Hotle, Jr., Deputy Dist. Atty., all of Oakland, for appellant.

H. L. Richardson, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued the administrator of the Estate of Richard McAfee, deceased, to recover the proceeds of two life insurance policies which had been paid to the administrator. The cause was tried by the court without a jury, and findings were made favorable to plaintiff upon which she had judgment. The defendant has appealed on the judgment roll alone.

The trial court found that, in a discussion between plaintiff, the deceased, and an agent of the insurance company, the deceased stated that plaintiff had agreed to take care of the deceased during his last illness and to pay the burial expenses, and that he desired insurance upon his life so that the proceeds of the policy might be available for those purposes. The agent stated that plaintiff could not be named beneficiary because she had no "insurable interest", but that the proceeds "would be paid to whoever held the policy at the time of the death of decedent or to any person who would pay the premiums on said policy and/or look after the welfare and/or well-being of decedent under the provisions of the facility of payment clause which appeared on the face of the policy". In accordance with these understandings, the estate was named beneficiary of the policy, and upon its delivery the decedent immediately made a gift of the policy to plaintiff. The first policy was in the principal sum of $450. About four months after it was issued the parties procured a second policy in the principal sum of $621 under the same circumstances and understandings. The trial court further found that the plaintiff fulfilled her terms of the agreement—that she supported the deceased until his death, and paid all the premiums on both policies. Upon these findings of fact the trial court concluded that plaintiff was entitled to the entire proceeds of the policies, that defendant had no interest or estate therein, and that defendant be enjoined from asserting any claims thereto adverse to plaintiff.

[1, 2] The appellant states the question involved in this appeal as follows: "Can an assignee, not having an insurable interest in the life of the deceased, recover the proceeds of life insurance payable to the Estate of the Deceased, which policies were obtained and assigned pursuant to a preconceived plan to evade the law requiring insurable interest." We do not so understand the controversy because, first, the plaintiff was not without an insurable interest, and, second, there is no issue of fraud or "evasion" because that defense was not raised and not proved and the findings of fact, which we must take as conclusive on this appeal on the judgment roll, completely negative the existence of any evidence tending to support such an issue. This leaves just two debatable questions, and these are determinative of all the issues on this appeal. They are: first, did the respondent have an insurable interest in the life of the deceased; and second, do the findings support the judgment? Both will be answered in the affirmative.

[3] Section 10110 of the Insurance Code, St.1935, p. 636, reads: "Insurable interest. Every person has an insurable interest in the life and health of: (a) Himself. (b) Any person on whom he depends wholly or in part for education or support. (c) Any person under a legal obligation to him for the payment of money or respecting property or services, of which death or illness might delay or prevent the performance. (d) Any person upon whose life any estate or interest vested in him depends." Respondent comes within subdivision (c) of this section. Her case is just the reverse of that shown in Rudell v. Board of Administration etc., 8 Cal.2d 600, 66 P.2d 1203. Here, while respondent and deceased lived together as husband and wife, though without a legal marriage, the respondent supported the deceased; whereas, in the Rudell case, the deceased supported the beneficiary named in the insurance policy. In the instant case the trial court found that respondent supported deceased "at all times herein mentioned". That would cover the time from the application for the policies to the death of the deceased. The implied promise to pay for these services arose from the time

of respondent's promise to perform them. It was a legal obligation to pay money at the time of such promise, or, at least, it was a legal obligation "respecting services".

[4, 5] But if there is any uncertainty as to that conclusion there can be none as to this: that the insurer is the only party who can raise the question of insurable interest, and that, if the insurer waives the question of interest and pays the money to the named beneficiary, or into court, neither the personal representative nor the creditors can claim the proceeds on that ground. Woodmen of the World v. Rutledge, 133 Cal. 640, 644, 65 P. 1105; Wheeler v. Factors', etc. Ins. Co., 101 U.S. 439, 441, 25 L.Ed. 1055. Hence the answer to the first inquiry is that respondent either had an insurable interest in the life of the deceased or that she had such an interest that the appellant could not attack. Giving to the findings of fact all the intendments and presumptions necessary to support the judgment, the necessary conclusion is that respondent's obligation to care for deceased during his last illness and to pay his burial expenses was a "legal obligation" within the section. When, therefore, she was informed that she could not be named beneficiary but that the same result could be obtained by a gift of the policies to her, a trust arose in her favor of the same force as those approved in Furman v. Craine, 18 Cal.App. 41, 45, 121 P. 1007; Owens v. McNally, 113 Cal. 444, 448, 45 P. 710, 33 L.R.A. 369; American Bible Society v. Mortgage Guar. Co., 217 Cal. 9, 13, 17 P.2d 105; Shelly v. McKimmons, 32 Cal.App.2d 711, 714, 90 P.2d 842.

[6] The second inquiry is answered by what has just been said. The findings of fact support the judgment because they disclose either an insurable interest or a case in which the question cannot be raised, and hence, whatever is necessary in respect to the insurable interest, must be presumed in support of the judgment. They also disclose the contract of the parties, their intention throughout, the absence of any fraud, deceit or evasion, and the legal and equitable title of respondent in the proceeds, free from any adverse claim of appellant.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

---

35 Cal.App.2d 533

WINDAS v. GALSTON & SUTTON THEATRES, Inc. (two cases).

Civ. 12328, 12329.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1939.

Rehearing Denied Dec. 14, 1939.

Hearing Denied Jan. 18, 1940.

1. Negligence ⚷138(2)

Instruction that when a thing which causes injury is shown to be under the management of a defendant and the accident is such as in the ordinary course of things does not happen, if those who have the management used proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of proper care, and that if defendants or either of them were negligent and that negligence was a proximate cause of injury and that plaintiffs were free from negligence and plaintiffs could recover substantially stated rule of "res ipsa loquitur."

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

2. Negligence ⚷121(3)

The doctrine of res ipsa loquitur is generally applicable to cases involving falling objects.

3. Theaters and shows ⚷6

Where patrons of theater were injured by plaster falling from ceiling, doctrine of "res ipsa loquitur" applied and it was for theater operator to explain the occurrence and to dispel by evidence if possible the inference of want of proper care which arose in favor of patrons.

4. Appeal and error ⚷671(3)

Where transcript was certified "is true and correct as per reporters certificate" and two reporters served at trial and each attached a separate certificate, and no statement was made in either certificate that all testimony was contained in the transcript or that all the writings received in evidence had been copied and included therein, and transcript was not certified as "full", reviewing court would not consider contention that evidence dispelled inference of negligence resulting from the falling of plaster on theater patrons. Code Civ.Proc. § 953a.

5. Landlord and tenant ⚷169(4)

Where theater occupied solely by lessee had separate roof and lessee expressly agreed with lessor to keep the ceiling in good condition, lessee had such control of the premises as to justify the application of the doctrine of res ipsa loquitur, where patrons of theater were injured by plaster falling from the ceiling.

6. Landlord and tenant ⚿167(2)

Lessee of a theater could not be excused by covenant by which lessor agreed to repair the roof from duty of using proper care in the management of the premises under its control as respects liability to patrons injured by falling plaster.

◆

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Actions by May Windas and Cedric W. Windas against Galston & Sutton Theatres, Inc., a corporation, for injuries resulting from the falling of a block of plaster from the ceiling of a theater. From judgments for the plaintiffs, defendant appeals.

Affirmed.

Sidney A. Moss, of Los Angeles, for appellant.

Caryl Warner and Joseph W. Ryan, both of Los Angeles (William H. Brawner, of Los Angeles, of counsel), for respondents.

WOOD, Justice.

While attending a performance in the Marcal Theatre in the city of Los Angeles plaintiffs were injured by the falling of a block of plaster from the ceiling of the theatre about 30 feet above them. Separate actions were commenced by plaintiffs, which were consolidated for trial with actions commenced by other parties who were injured at the same time. A jury returned verdicts in favor of plaintiffs against the corporation which was operating the theatre.

[1] It is contended by appellant that the trial court erred in applying the doctrine of res ipsa loquitur, concerning which the jury was given the following instruction: "When a thing which causes injury is shown to be under the management of a defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant, that the accident arose from want of proper care. And the jury is further instructed that if it should find that defendants or either of them were negligent and that said negligence was the proximate cause of injury, and that plaintiffs were free from negligence, then, in such an event, you shall render your verdict in favor of plaintiffs or either of them and against the defendants or either of them, as the case may be". No criticism is aimed at the language of this instruction, which, though not perfect, substantially states the rule, but it is claimed that the doctrine has no application in a case where a patron of a theatre is injured by plaster falling from the ceiling.

[2, 3] That the doctrine of res ipsa loquitur is in general applicable to cases involving falling objects is not disputed. In a number of jurisdictions the doctrine has been applied to cases of plaster falling from ceilings. Appellant relies upon Thompson v. Cooles, 7 W.W.Harr., Del., 83, 180 A. 522, a case in which plaster fell from the ceiling of a pool room upon one of the patrons, and in which it was held that the doctrine was inapplicable. On the other hand the doctrine has been held applicable in Morris v. Zimmerman, 138 App. Div. 114, 122 N.Y.S. 900, and in Halterman v. Hansard, 4 Ohio App. 268, where the parties were injured by plaster falling from rooms in hotels; and in Law v. Morris, 102 N.J.L. 650, 133 A. 427, 46 A.L.R. 1108; Taylor v. Popular Dry Goods Store, Tex.Civ.App., 10 S.W.2d 191, and Manson v. May Dept. Store Co., 230 Mo.App. 678, 71 S.W.2d 1081, where the parties injured were customers in stores; and in Bonita Theatre v. Bridges, 31 Ga.App. 798, 122 S.E. 255, where the injured party was attending a performance in a theatre. In California the doctrine was held applicable in Mintzer v. Wilson, 21 Cal.App.2d 85, 68 P.2d 370, a case in which the plaintiff was injured by falling plaster while she was a guest in a hotel. It thus appears that the trial court ruled in accordance with the weight of authority on the subject and in accordance with a decision of the District Court of Appeal of this state. The ruling of the trial court was both reasonable and just. When plaintiffs entered the theatre they were compelled to rely upon the operator of the theatre to discharge its duty to use reasonable care to see that the premises under its control were kept in a safe condition. Plaster does not ordinarily fall from a ceiling if proper care has been used to see that the ceiling is safe. The way was open to appellant to

present an explanation of the occurrence and to dispel by evidence, if possible, the inference of want of proper care which arose in favor of plaintiffs. The jury impliedly held that the evidence presented did not dispel this inference.

[4] Appellant further contends that "the evidence introduced by the defendant in explanation of the accident dispels, as a matter of law, the permissible inference of negligence, if the maxim was properly applied in the first instance". In substantiation of this contention appellant refers to evidence concerning certain inspections made of the premises. We may not, however, consider the contention for the reason that we have not been furnished with such a record as would enable us to do so. City of Los Angeles v. Moyer, 108 Cal. App. 4, 290 P. 1073. The trial judge certified that the transcript "is true and correct as per reporters certificate". Two reporters served at the trial and each attached a separate certificate to the transcript. Each certificate contains the names of certain witnesses whose testimony appears to have been transcribed but after the names of two of the witnesses the word, partial, appears in parenthesis. No statement is made in either certificate that all of the testimony is contained in the transcript and no statement is made that all writings received in evidence have been copied and included therein. It is provided in section 953a of the Code of Civil Procedure that "the judge shall examine the same and see that the same is a full, true and fair transcript * * *." The record before us contains no certificate that the transcript is "full". It was the duty of appellant to furnish such a record as would permit the reviewing court to determine if prejudicial error was committed. This court cannot hold that appellant's evidence dispelled the inference in plaintiffs' favor as a matter of law in the absence of all of the evidence on the subject properly certified by the trial court. In re Silva, 213 Cal. 446, 2 P.2d 341.

[5, 6] It is further contended by appellant that it was not in such control of the premises where the accident occurred as to justify the application of the doctrine of res ipsa loquitur. We find no merit in this contention. In its answer appellant admitted that "at all times pertinent hereto he was in possession of and the operator of" the theatre in question. Appellant was the lessee of the theatre from the owner of the property. The front part of the building was a two-story structure, the foyer of the theatre being on the first floor. The offices above the foyer were rented to other parties by the owner. The theatre, which was occupied solely by appellant, was separate and had a separate roof. There was an attic between the ceiling and the roof. By the terms of the lease appellant was granted full possession of the theatre. The owner agreed to repair any damage to the "outside and roof of said premises", but appellant, as lessee agreed to "keep and maintain said premises and property demised herein in good order and condition except as herein otherwise provided". It thus appears that appellant expressly agreed to keep the ceiling in good condition. There is nothing in the owner's agreement to repair the roof which in any way affected appellant's control and management of the theatre, including its ceiling, or his duty to use reasonable care for the protection of the patrons of the theatre. Moreover, appellant cannot be excused by a covenant with the lessor from the duty of using proper care in the management of the premises under its control, premises which appellant had invited the public to enter to view the performances being given. Hamelin v. Foulkes, 105 Cal.App. 458, 287 P. 526.

The judgments are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

---

35 Cal.App.2d 475

PEOPLE v. VARGAS.

Cr. 391.

District Court of Appeal, Fourth District, California.

Nov. 16, 1939.

Criminal law 🔑1182

Where clerk's and reporter's transcripts were filed October 16, and case was placed for argument on calendar of November 14, but no brief or appearance was filed or made for defendant, conviction was affirmed. Pen. Code, § 1253.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Jesus Vargas was convicted of an offense, and he appeals.

Affirmed.

John B. Lonergan, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., and John P. Knauf, Deputy Dist. Atty., of San Bernardino, for respondent.

MARKS, Justice.

This is a motion to affirm the judgment under the provisions of section 1253 of the Penal Code.

The clerk's and reporter's transcripts were filed in the office of the clerk of this court on October 16, 1939. The case was placed for argument on the calendar of November 14, 1939. No brief or appearance has been filed or made for defendant.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

---

35 Cal.App.2d 472

PEOPLE v. KNIGHT.

Cr. 1701.

District Court of Appeal, Third District, California.

Nov. 16, 1939.

Hearing Denied Dec. 14, 1939.

1. Automobiles 🔑351

An information charging that defendant unlawfully drove an automobile upon a highway while under the influence of intoxicating liquor was not defective for failure to charge that driving occurred on a public, as distinguished from a private, highway, in view of provision of vehicle act defining a highway as a way or place of whatever nature publicly maintained and open to the use of the public for purposes of vehicular travel. Vehicle Code, § 502, St.1935, p. 174, and § 81, St.1937, p. 617.

A "highway" is a main road or thoroughfare; hence, a road or way open to the use of the public.

[Ed. Note.—For other definitions of "Highway," see Words & Phrases.]

2. Indictment and Information 🔑86(3)

An information charging that on or about a certain day in a particular county defendant unlawfully drove an automobile upon a highway while under the influence of intoxicating liquor was not defective for failure to state in what township or on what road the act took place, in view of provision of Penal Code that jurisdiction of every public offense is in county where act is committed. Vehicle Code, § 502, St.1935, p. 174; Pen.Code, § 777.

3. Criminal law 🔑678(1)

Evidence that defendant was lying in a drunken stupor beside road and was assisted into automobile which had gone off road, that about an hour later defendant stopped to buy gasoline at a service station and drove away when attendant refused to sell him any because of his intoxicated condition, and that peace officer saw defendant driving his automobile a few minutes later, revealed a continuing offense of driving while intoxicated, as against contention that more than one offense was proved, and that district attorney should have been compelled to elect particular act he would rely on for conviction. Vehicle Code, § 502, St.1935, p. 174.

4. Criminal law 🔑678(1)

Driving an automobile while intoxicated is a continuing offense, and evidence of its commission at different times within the general charge does not demand an election by the district attorney of the particular act of illegal driving he will rely on for a conviction. Vehicle Code, § 502, St.1935, p. 174.

Appeal from District Court, Mendocino County; W. D. L. Held, Judge.

Filbern Knight was convicted of driving a vehicle upon a highway while under the influence of intoxicating liquor, and he appeals from the conviction and from an order denying a new trial.

Judgment and order affirmed.

Burke & Rawles, of Ukiah, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was convicted of driving a vehicle upon a highway while under the influence of intoxicating liquor, sec. 502, Vehicle Code, St.1935, p. 174, and from such conviction, and an order denying a new trial, he prosecutes this appeal.

As grounds therefor appellant contends the information fails to state a public offense, and that it is uncertain and ambiguous. It is alleged in the information, following the language of the statute, that: "On or about the 10th day of June, 1939, in the County of Mendocino, State of California, said defendant did then and there wilfully and unlawfully drive a vehicle, to-wit, an automobile, upon a highway while he, the said defendant, was under the influence of intoxicating liquor."

[1] The first specification of error is that the information does not allege that the act complained of occurred upon a public, as distinguished from a private, highway. There is no force in this objection. The word "highway" is defined in section 81 of the Vehicle Act, as amended by St.1937, p. 617, as, "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel". According to Webster's International Dictionary, a highway is a main road or thoroughfare; hence, a road or way open to the use of the public. In its earlier use a highway designated a principal way traveled by the general public, as distinguished from a byway, or bypath. It is thus apparent that neither in the Vehicle Code (at least since 1935), nor in ordinary usage, is there such a thing as a private highway. Appellant cites us to In re Worthington, 21 Cal.App. 497, 132 P. 82, and People v. Hoenschle, 132 Cal. App. 387, 22 P.2d 777; but at the time those decisions were written, the statute, sec. 112 of the California Vehicle Code, St. 1923, p. 553, made it unlawful for one under the influence of intoxicating liquor to drive a vehicle on any *public* highway within the state. In 1935 the word "public" was omitted from the section, bringing the use of the word "highway" into conformity with its correct and common usage.

[2] It is next urged that the information failed to state in what township or on what road the illegal act took place. Section 777 of the Penal Code provides that jurisdiction of every public offense is in the county where the act is committed. No greater particularity as to venue is necessary. In People v. Mazzola, 80 Cal.App. 583, 251 P. 222, the defendant was charged with unlawfully maintaining a place where intoxicating liquor was manufactured. It was there held it was unnecessary to state in the information the particular location in the county where the alleged offense was committed.

[3, 4] Lastly, it is claimed that more than one offense was alleged and proven, and that the district attorney should have been compelled to elect as to which particular act of illegal driving he would rely upon for a conviction. In this also appellant is in error. The testimony was that about 6 o'clock in the evening of the day in question a garage-man was summoned to get a car back on the highway. When he arrived at the scene of the accident he found a touring-car several feet off the road, and lodged against some trees and rocks. Several men were in the car, but not the defendant, who was lying in a drunken stupor beside the road. The car was pulled back onto the road, the defendant assisted in, and the car and its passengers were towed to the foot of the grade. The next witness testified that about an hour later defendant came to his service station and wanted to purchase some gas, but observing his intoxicated condition, the attendant refused to sell him any, and called a peace officer. Defendant drove away, but he was seen a few minutes later by the officer, driving his car a short distance from the service station, and subsequently defendant was taken into custody These facts do not reveal more than a continuing offense of driving while intoxicated. There was no evidence of the defendant driving at any time, except at the service station and shortly thereafter when seen by the officer. Driving while intoxicated is a continuing offense, and evidence of its commission at different times within the general charge does not demand an election. 15 C.J., § 2172. Appellant cites People v. Castro, 133 Cal. 11, 65 P. 13; People v. Williams, 133 Cal. 165, 65 P. 323, and People v. Bartnett, 15 Cal.App. 89, 113 P. 879. These first two cases involved charges of rape, and the latter case was for embezzlement. It is apparent that those types of offenses are readily distinguishable, as to continuity, from driving while intoxicated.

The judgment and order are affirmed.

We concur: TUTTLE, J.; THOMPSON, J.

35 Cal.App.2d 544

HENRICKSON v. CALIFORNIA TALC CO. et al.

Civ. 2463.

District Court of Appeal, Fourth District, California.

Nov. 20, 1939.

Action ⟹6

In action for declaratory relief to determine plaintiff's interests in unpatented mining claim, findings of fact were insufficient to support judgment for plaintiff, where, because of inconsistent findings, it could not be determined whether trial court intended to find in accordance with theory that subsequent locations of claim were made by defendants, but that plaintiff's rights continued in subsequent locations, because they were recognized by defendants in all of their later acts and dealings among themselves, or whether court intended to find that defendants' subsequent locations, although antagonistic to plaintiff's rights, were ineffective because original location was good.

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Oscar Henrickson against the California Talc Company, National Lead Company, Mabel E. Hoerner, Harry J. Hoerner, O. B. Aman, George L. Ratcliffe, and others, for declaratory relief to determine plaintiff's interests in four unpatented mining claims. The defendant O. B. Aman filed a cross-complaint seeking to establish his ownership of a one-sixth interest in one of claims. From judgment entered, the California Talc Company, the National Lead Company, Mabel E. Hoerner and Harry J. Hoerner appeal.

Reversed and remanded in part.

Kenyon F. Lee, of Los Angeles, John L. Campbell, of Pasadena, and Duckworth & Harrison, of San Bernardino, for appellants.

C. E. Crowley, of Ontario, and Harry H. Parsons, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action for declaratory relief to determine his interests in four unpatented mining claims, including one known as "Cooperation No. 1". The complaint alleged that in 1928, the plaintiff entered into a mining partnership with one Oscar Hoerner; that during that year the partners located three of the claims in question; that on June 7, 1930, the partners and four of the defendants here located the Cooperation No. 1 claim; that Oscar Hoerner, with his wife and brother, subsequently jumped and relocated these four claims without including the plaintiff in such new locations; that the Hoerners and the other defendants conspired to cheat and defraud the plaintiff out of his interest in these claims and to this end recorded various notices and contracts which are a cloud upon the interests of the plaintiff in these claims; that a trust and fiduciary relationship existed between the parties; that the plaintiff has no plain, speedy or adequate remedy at law; and that unless equitable relief be given he will suffer irreparable injury. The prayer is for declaratory relief, for an accounting, for an injunction, that the plaintiff be declared to be the owner of an undivided 1/6th interest in the Cooperation No. 1 claim and an undivided ½ interest in the other claims, and for other equitable relief.

Answers were filed by various defendants. Among other things, it was alleged that on June 4, 1930, the land upon which the Cooperation No. 1 mining claim was purportedly located was withdrawn from public entry and had not been restored to such entry on June 7, 1930, when plaintiff's purported location was made; that such location is void; that after said land was restored to public entry the land which had been embraced in the Cooperation No. 1 claim was "located and relocated * * * by certain of said defendants"; and that by various agreements and assignments the interest of the other defendants had been sold under contract to the National Lead Company. A cross-complaint was filed by one defendant seeking to establish his ownership of a 1/6th interest in the Cooperation No. 1 claim.

The court made findings of fact and conclusions of law and entered a judgment decreeing, among other things, that the plaintiff is the owner of an undivided 1/6th interest in two of the claims, that he has no interest in one of the claims, and that he is the owner of an undivided 1/8th interest in the Cooperation No. 1 claim. The 1/8th interest thus awarded to the plaintiff is accounted for by the fact, as found, that he had conveyed a portion of his 1/6th interest to one Stephens.

Four of the defendants have appealed, on the judgment roll alone, from that portion of the judgment reading as follows:

"(4) That the 'Co-operation No. 1' Placer Mining Claim is a valid and subsisting placer mining claim and is situated in an unorganized mining district in the County of San Bernardino, State of California, and is described as follows: (Here follows description.)

"That the defendants George L. Ratcliffe, Reuben E. Scott, Jr., Harold H. Farnham, and Oscar B. Aman are each of the owners of an undivided one-sixth (1/6) interest, and the plaintiff, Oscar Hendrickson, is the owner of an undivided one-eighth (1/8) interest, and M. M. Stephens is the owner of an undivided one-twenty-fourth (1/24) interest in and to said 'Co-operation No. 1' Placer Mining Claim, as tenants in common."

This appeal, therefore, involves only the Cooperation No. 1 claim, and whether that portion of the judgment is supported by the findings.

The only point raised by the appellants is that the original location of the Cooperation No. 1 claim on June 7, 1930, was void and of no effect because that land had been withdrawn from entry on June 4, 1930. It is pointed out that the court found that said location was made by the respondent and five others on June 7, 1930, that the land was withdrawn from public entry on June 4, 1930, that the withdrawal was revoked and the land restored to public entry on August 6, 1931, and that the land had not been restored to public entry on June 7, 1930. It is argued that the statement in the judgment that Cooperation No. 1 is a valid and subsisting placer mining claim is therefore erroneous and not supported by the findings. In this connection it is argued that after the land was restored to public entry, and on December 15, 1931, the land was again located by others, including a part of those who had previously attempted to locate it, and that, the original location being void, any of the original locators had a legal right to unite with other locators in making a new and valid location. Conceding that the latter contention is true under some circumstances it is, under other circumstances, subject to equitable rules and considerations which may be controlling.

Speaking generally, the respondent's contention is that the land in question was included in a large tract of land which was temporarily withdrawn from public entry pending the fixing of a definite location of the line of an aqueduct to be built for the purpose of bringing waters from Boulder Dam into this state; that the respondent and his partner Oscar Hoerner, with others, filed the original location of Cooperation No. 1 claim on June 7, 1930, in good faith and in ignorance of the withdrawal order; that a fiduciary and trust relationship existed between the respondent and Oscar Hoerner; that while the original locators remained in possession of the claim and were proceeding with the necessary work thereon Oscar Hoerner discovered that the land had been withdrawn from entry; that without informing the respondent of this fact he waited until after the land had been restored to entry and then, with his wife and brother and certain others, filed a new location or new locations covering the same land; that the filing of the new locations on December 15, 1931, constituted a violation of the existing trust and fiduciary relationship; that the paramount title is still in the United States; and that as between the parties themselves the court correctly concluded and decreed that the respondent was the owner of an interest in this claim.

The difficulty with respondent's theory is that the court found that there was no trust or fiduciary relationship at any time between him and Oscar Hoerner. On the other hand, it does not clearly appear that the court's conclusion of law, which is included as a statement in the judgment, that Cooperation No. 1 is a valid and subsisting mining claim, is based upon and refers to the original location of that claim on June 7, 1930, which location the court found to have been made at a time when the land was not open to entry. This conclusion may refer to and be based upon a subsequent location or relocation. While the findings seem to indicate that relocations of this claim were later made, there is no definite finding as to when any such relocation was made or who made it. Such findings as there are in this regard are conflicting. In finding IX it is found that each of the defendants is a "relocator" of Cooperation No. 1 and of "every part thereof", but in finding VII it is found that it is not true that Cooperation No. 1 mining claim has been relocated by any of the defendants.

Other conflicts and inconsistencies also appear in the findings. In finding VII, it is found that nothing has ever been done by any of the defendants to deprive the plaintiff of any of his interest in this claim and no action has ever been taken by any of the defendants for the purpose of obtaining any part of plaintiff's interest in this claim. In finding XVII it is found that no defendant has ever repudiated any rights of the plaintiff in this claim. On the other hand, it is found in finding IX that all of the defendants, with the exception of Aman, deny plaintiff's rights and ownership in this claim "in toto". In finding VII it is found that Oscar Hoerner located and filed on mining claims, apparently including this claim, in the name of himself, his wife and his brother, but that he did not omit therefrom the name of the plaintiff as a colocator. In the next sentence, it is found that he did not include the name of the plaintiff as a colocator. In finding XXXV, it is found that the defendant California Talc Company and the defendant National Lead Company, in acquiring contractual rights in this claim, were bona fide purchasers for value and acted without notice of the claims of the plaintiff. In the next sentence it is found that both of these corporate defendants had constructive notice "that plaintiff was a colocator * * * of said Cooperation No. 1 placer mining claim." It is found in finding I that it is "indispensably necessary" that the plaintiff be given declaratory relief. In finding XIV it is found that it is not true that the plaintiff will suffer irreparable injury if he is not given declaratory relief.

Because of the inconsistent findings it cannot be told what the court intended to find as to the facts which are material in deciding this controversy. The findings as they are will not support a judgment in favor of any party to the action insofar as ownership of any interest in the Cooperation No. 1 claim is concerned. It cannot be told whether the court intended to find in accordance with the theory that subsequent locations of this claim were made, that the rights of the respondent continued in and through these subsequent locations, and that those rights were recognized by the appellants in all of their later acts and dealings among themselves, and were unaffected thereby, or whether it intended to find that subsequent locations and actions, although antagonistic to the rights of the respondent, were ineffective for the reason that the original location was good. The action should be retried and appropriate and definite findings made on the issues raised in connection with the Cooperation No. 1 mining claim.

The portion of the judgment appealed from is reversed and that part of the action remanded for a new trial.

We concur: MARKS, J.; GRIFFIN, J.

35 Cal.App.2d 554

PEOPLE v. LOVLEE.

Cr. 3231.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1939.

1. Criminal law ⚷1032(5)

Where no demurrer was interposed to an information, its sufficiency could not be considered on appeal.

2. Criminal law ⚷1134(8)

An alleged defect in an information cannot be considered on appeal from an order denying a motion for new trial after conviction, where there is no appeal from judgment of conviction. Pen.Code, § 1012.

3. Criminal law ⚷935(1)

In prosecution for perjury in connection with posting of so-called property bail bonds, where there was abundant evidence to support trial court's finding of guilt as well as to supply the necessary corroboration required by law, the court did not abuse its discretion in denying a motion for new trial after conviction.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Leona Peters Lovlee was convicted of perjury, and she appeals from an order denying her motion for a new trial.

Order affirmed.

Bertram H. Ross, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant appeals from an order denying her motion for a new trial after conviction of four counts of perjury by the court, a jury trial having been duly waived.

The general nature of the alleged offenses related to the posting of so-called property bail bonds.

Briefly, in substance, the information alleged that defendant appeared on one occasion before the judge of the municipal court of Long Beach, California; on another occasion before a judge of the superior court of the state of California, in Los Angeles; on another before a duly qualified and acting deputy county clerk of Los Angeles county, and on another before a duly acting and qualified court commissioner of the superior court of Los Angeles county, where, upon each occasion, defendant "under oath duly administered" falsely swore and deposed that she was the owner of various items of real property of certain values respectively, whereas in truth she was not the owner thereof nor did such property have the value claimed for it by defendant. It was further alleged that all of the alleged testimony given by defendant before the magistrate in connection with her examination and qualification as a bondsman was for the purpose of deceiving the court and to procure the approval of the bail bond then and there offered by defendant.

The record reveals that upon the day fixed for the pronouncing of judgment, defendant moved for a new trial upon three grounds, namely, "that the evidence was insufficient to justify the decision"; "errors of law occurring at the trial"; and "newly discovered evidence". No affidavits were offered in support of the last mentioned ground. The motion was submitted without argument and forthwith denied.

It is contended on appeal: First, "That the information does not state facts sufficient to constitute a public offense"; second, that "The evidence is legally insufficient to support the conviction"; and, third, that "The evidence is not corroborated in the manner provided for by law".

[1,2] As to the first contention above mentioned, no demurrer was interposed to the information, and, in the circumstances, its sufficiency cannot be considered on appeal. As hitherto declared, "The suggestion in appellant's brief, of a defect in the information cannot be considered, since there is no appeal from the judgment. People v. Turner, 39 Cal. 370; Pen.Code, § 1012." People v. Sanchez, 23 Cal.App. 742, 139 P. 820.

[3] As to the second and third contentions, it is sufficient to note that there is abundant evidence to support the court's finding of guilt, as well as to supply the necessary corroboration required by law. No abuse of discretion appears from the court's order denying the motion for a new trial.

The order denying defendant's motion for a new trial is affirmed.

We concur: YORK, P. J.; WHITE, J.

35 Cal.App.2d 525

SKIDMORE v. TUOLUMNE COUNTY.

Civ. 10842.

District Court of Appeal, First District, Division 2, California.

Nov. 20, 1939.

As Modified Dec. 12, 1939.

Hearing Denied Jan. 18, 1940.

1. Counties ⟹200

A claim for services performed under a contract to furnish county with information as to tax delinquencies was not barred as to such items as had accrued more than a year prior to presentation of claim, since the separate amounts accruing for services were to be treated as items of one claim rather than as separate claims requiring a separate demand. Pol.Code, § 4075.

2. Appeal and error ⟹757(5)

Where appeal was taken on a typewritten transcript, and point was made which constituted but a statement of fact contrary to the findings of the trial court, if there was anything in the typewritten record which would call for a different finding, appellant should have printed it in his brief. Code Civ.Proc. § 953c.

3. Counties ⚷194

A claim for services performed under contract to furnish county with information as to tax delinquencies in return for a percentage of the redemptions actually made and paid to the county was valid as to the delinquencies actually paid, irrespective of statute which became effective after the work was performed cancelling tax liens more than 30 years old. Pol.Code, § 3716.

4. Appeal and error ⚷761

The point that portion of claim for services performed under contract to furnish county with information as to tax delinquencies was based on delinquencies which had been redeemed prior to effective date of contract could not be considered on appeal in absence of argument in the briefs to support the point.

5. Contracts ⚷143

In a suit on a contract, the courts must take the contract of the parties as the parties have written it.

6. Counties ⚷194

Contracts to furnish county with information as to tax delinquencies in return for a percentage of the delinquencies actually collected were unambiguous and did not call for judicial interpretation.

7. Counties ⚷194

The provision in contract to furnish county with information as to tax delinquencies, that final payment should be made "when" affidavit was furnished reciting that report and recommendations had been checked and submitted, did not fix date with reference to which final payment should be made but merely required filing of affidavit as a procedural step, in the nature of a condition precedent to final judgment.

[Ed. Note.—For other definitions of "When," see Words & Phrases.]

8. Evidence ⚷179(2)

In action on rejected claim for services performed under contracts to furnish county with information as to tax delinquencies in return for a percentage of the delinquencies actually collected, claimant was not required to place in evidence all the records of the county, the state and of the United States land office upon which his reports were based, but was entitled to testify generally as to the contents of the records. Code Civ. Proc. § 1855, subd. 5.

9. Appeal and error ⚷1047(5)

In action on rejected claim for services performed under contracts to furnish county with information as to tax delinquencies, where every essential item on which claimant's recovery rested was found in county's records, failing to compel claimant to place in evidence all the records of the county, the state, and of the United States land office upon which his reports were based, and permitting him to testify generally as to the contents of the records, was harmless, if error. Code Civ.Proc. § 1855, subd. 5.

10. Counties ⚷194

Under contracts to furnish county with information as to tax delinquencies in return for one-half of what county received "after this day" for redemption or sale of property on which taxes were first delinquent for the fiscal year 1923–24 or were delinquent for prior years, where in certain cases redemption had been made of an early delinquency prior to 1923–24, claimant was not precluded from recovering percentage on a redemption after date of contract; a new delinquency having occurred.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by C. E. Skidmore against the County of Tuolumne on a rejected claim for services performed under two written contracts. Judgment for plaintiff, and defendant appeals.

Affirmed.

C. H. Grayson, Dist. Atty., and Rowan Hardin, both of Sonora, for appellant.

Webb, Webb & Olds, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on a rejected claim for services performed under two written contracts. The cause was tried by the court without a jury, and plaintiff had judgment. The appeal is taken on a typewritten transcript.

The contracts are found in resolutions of the board of supervisors of defendant county, dated May 6, 1930, and December 7, 1931, respectively. Both are practically identical, except that the first related to delinquencies occurring in and prior to 1923–1924, while the second related to delinquencies occurring in and prior to 1925–1926. The first resolution authorized plaintiff to check the tax records and the records of several named public offices to discover property "on which the taxes were first delinquent for the fiscal year 1923-1924, or are delinquent for prior years, which do not show redemption, cancellation or sale by the State * * * said party shall also submit reports * * * with recommendations as to further disposition * * *. Said county of Tuolumne will pay said C. E. Skidmore for such services an amount equal to fifty per cent (50%) of the County of Tuolumne's portion of all moneys received by the said County of Tuolumne from and after this day for redemption or sale of said property above referred to."

The validity of these particular contracts was finally determined in Skidmore v. Dambacher, 6 Cal.App.2d 83, 43 P.2d 1110, where the county auditor of Tuolumne county was ordered to approve a warrant for compensation arising under the contracts. Similar contracts were declared valid in Skidmore v. West, 186 Cal. 212, 199 P. 497, and Skidmore v. County of Alameda, Cal.Sup., 90 P.2d 577. The six grounds which appellant raises to defeat the judgment will be considered in order.

[1] First. "That plaintiff's claim is barred by Sec. 4075 of the Political Code." Appellant's argument is that since the plaintiff commenced work at once under the contracts and furnished lists, reports, and recommendations from time to time, the claim for compensation presented to the board of supervisors in 1935 is valid only as to such items thereon as shall have accrued within a year of the date of presentation of the claim. The precise point was determined adversely to appellant in Skidmore v. County of Alameda, supra, 90 P.2d page 581, where it was held that separate amounts accruing for services under a written contract should be treated as items of one claim rather than as separate claims requiring a separate demand in determining the question of the running of the statute of limitations.

[2] Second. "That portion of demand is based on void delinquencies or on claimed delinquencies which do not exist. * * *" The point as presented is but a statement of fact contrary to the findings of the trial court that the demand presented to the board of supervisors disclosed the delinquencies occurring in the fiscal year 1925–1926, and in prior years, with all the redemptions thereof upon which the compensation of respondent was based. No evidence is furnished or referred to contradicting this finding. If there is anything in the typewritten record which would call for a different finding, the appellant should have printed it in his brief. Section 953c Code of Civil Procedure. Certainly nothing appears here to support appellant's claim that some of these delinquencies "do not exist". The record, so far as we have it, is the court's implied finding that they did. If we may assume that some of these delinquencies, because of the lapse of time, are no longer enforceable, this would not permit us to set aside the finding if, as appears from the record, these redemptions were made on such delinquencies notwithstanding their date. Respondent's compensation was estimated, and this judgment founded on the basis of redemptions made and paid into the county, notwithstanding the validity or invalidity of the claimed delinquencies. He was not required to pass on the legality of the county's claim for taxes. It was the fact of payment and redemption which fixed his right to compensation.

[3] Appellant's confusion in the presentation of the point seems to arise from a misconception of the terms of the contracts in view of current legislation. The respondent undertook in his contracts to investigate and report to appellant on all delinquencies first occurring in the fiscal year 1923–1924 and years prior thereto. He was to be paid on the basis of redemptions or sales made upon delinquencies so found. Hence, if there were no redemptions, there was no pay. Running through appellant's argument is the suggestion that, since section 3716 of the Political Code cancelled every tax lien more than thirty years old, those delinquencies noted in the demand as having first occurred more than thirty years prior to the fiscal year of 1923–1924 must be deemed void, and hence respondent should not recover upon them. The argument is not impressive because the effective date of the code amendment was after the work was performed by respondent, and the only evidence brought to our attention discloses that redemptions were nevertheless made, and it is upon that basis that the appellant owes respondent fifty per cent of what was paid to the county.

[4] Third. "That portion of demand is based on delinquencies which had been redeemed prior to effective date of plaintiff's contract." Though we have quoted the point verbatim from appellant's opening

brief, we should state that no argument is made in the briefs in support of it. It may be taken for granted that if the evidence discloses that a portion of the demand is based on redemptions "prior to effective date of plaintiff's contract" recovery could not be had to that extent because plaintiff's contract called for payment upon delinquencies found "which do not show redemption, cancellation or sale by the State". Here again the point is not presented in a manner which permits consideration. The mere statement of counsel in his brief that facts exist contrary to those found by the trial court does not present a justiciable question on appeal.

[5, 6] Fourth. "That portion of demand is based on delinquencies arising entirely after the effective date of plaintiff's contract." Appellant's case becomes progressively worse. The lack of organization in presentation prevents a logical disposition of the issues involved. Here again we have quoted the point involved verbatim from appellant's brief. The argument is divided into two heads, one stating that "more than two-thirds of plaintiff's claim is based on delinquencies arising entirely after the fiscal year 1925-1926", the other stating that "approximately three-fourths of the total of plaintiff's claims arises" from similar delinquencies. The only difference in the two divisions of the argument is the difference between "more than two-thirds" and "approximately three-fourths". We are referred to "defendant's exhibit No. 3" and asked to make a computation. This exhibit consists of about one hundred separate pages each of which is a copy of an individual certificate of redemption. We are not referred to any evidence which would negative the trial court's findings that, pursuant to his contracts the plaintiff checked the tax records of property "on which the taxes were first delinquent for the fiscal year 1925-1926, or are delinquent for prior years".

The rules of law are settled that, in a suit on a contract, the courts must take the contract of the parties as the parties have written it. Here there is no valid claim of uncertainty or ambiguity, no claim of mistake, fraud, or over-reaching which is supported by any proof. The contracts are both plain and unambiguous and do not call for judicial interpretation. The parties were all men of experience and presumably in possession of their mental faculties. They contracted to pay respondent one-half of what was paid to the county "from and after this day for redemption or sale of said property"—i. e., the property on which the taxes were *first* delinquent for the fiscal year 1925–1926, or delinquent for prior years.

[7] Appellant argues that there is some uncertainty in the contracts as to when payments thereunder should end. Attention is directed to the contract provision reading "The final payment thereof to be made to said C. E. Skidmore when he has furnished an affidavit setting forth that he has checked * * * and has also submitted * * * his report and recommendations * * *." It is admitted that such an affidavit was filed November 5, 1934. Claim is made for redemptions paid to the county after that date. It is argued that the contract should be interpreted as meaning that the final payment should be made as of July 1, 1926, but no reason is given for taking that date. The difference between "final payment" of claims which have accrued prior to a fixed date, and the "end of time" within which claims may be presented is apparent. The filing of the affidavit required by the contract is but a procedural step, in the nature of a condition precedent, in the process of payment of all the claims. Proper interpretation of the provision in the contracts that the final payment shall be made to respondent "when" he has furnished an affidavit of full performance means that final payment shall be made if or in the event respondent has submitted such affidavit.

[8, 9] Fifth. "That no valid proof was offered to sustain complaint." The argument on this branch of the case is that the respondent should have been compelled to place in evidence all the records of the County, the State, and of the United States land office upon which his reports were based, and that it was error to permit him to testify generally as to the contents of these records. The point is without merit since the procedure is directly covered by subdivision 5 of section 1855 Code of Civil Procedure which permits such testimony, "When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole". Every essential item of proof upon which respondent's

right of recovery rests is found in appellant's own public records. No possible prejudice was suffered by appellant in the rulings complained of.

[10] Sixth. "Part of claim based on delinquencies which had been cleared by redemption." The statement does not express what appellant means. His argument is that since some items of the account show that redemption had been made of an early delinquency prior to 1923–1924, and then, a new delinquency occurring, a redemption was made after the date of the contract, the respondent should recover nothing paid on this last redemption. This is not in accordance with the terms of the contract in which appellant agreed to pay one-half of what it received "after this day" for redemption or sale of property on which the taxes were "first delinquent for the fiscal year 1923-1924 or are delinquent for prior years".

Appellant contracted for respondent's services, accepted the services rendered under the contract, and received and retained all the benefits of the contract. The appeal is wholly without merit.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

WEST KEY NUMBER SYSTEM

---

35 Cal.App.2d 455

In re BORNEMAN'S ESTATE.

Civ. 11230.

District Court of Appeal, First District, Division 2, California.

Nov. 14, 1939.

1. Marriage 🔑40(5)

In estate proceeding wherein two persons claimed to be decedent's surviving wife and sought appointment as administratrix, strong presumption existed of validity of marriage to the second wife which was proved to have taken place approximately seven years after the separation of decedent and first wife. Civ.Code, § 61.

2. Marriage 🔑50(2)

As respects which of two persons claiming to be decedent's surviving wife and seeking appointment as administratrix was the surviving wife, trial court was not required to accept testimony of first wife to effect that decedent, whose second marriage occurred approximately seven years after separation from first wife, left the first wife. Civ.Code, § 61.

3. Marriage 🔑40(5)

Where decedent married second wife approximately seven years following absence of first wife and record did not indicate that the decedent had knowledge of continuation of the first wife's life at time of the subsequent marriage, presumption existed that decedent believed his first wife was not living at time of the subsequent marriage, and the subsequent marriage was valid, and hence the second wife was entitled to appointment as administratrix of decedent's estate. Civ.Code, § 61.

4. Marriage 🔑11

Under the common law, a subsequent marriage contracted by any person during life of former spouse is illegal unless the former marriage has been annulled or dissolved.

5. Marriage 🔑40(5, 11)

In case of conflicting marriages of same spouse presumption of validity operates in favor of second marriage, and burden of showing validity of first marriage is upon party asserting it.

6. Marriage 🔑40(6)

In case of conflicting marriages, even where validity of first marriage is established, presumption exists in favor of the second marriage that at the time thereof the first marriage had been dissolved either by decree of divorce or by death of former spouse, so as to cast the burden of adducing evidence to the contrary on the party attacking the second marriage.

7. Marriage 🔑40(10)

In estate proceeding wherein two persons claimed to be decedent's wife and sought appointment as administratrix, evidence of alleged first wife of decedent that first marriage was not dissolved or annulled was insufficient to rebut presumption of innocence of decedent and of validity of the subsequent marriage.

8. Marriage 🔑40(11)

In estate proceeding, wherein two persons claimed to be decedent's surviving wife and sought appointment as administratrix, alleged first wife had burden of introducing such evidence as would convince the trial court that the first marriage had not been dissolved at time of decedent's second marriage.

9. Appeal and error ⚿1011(1)

Mere conflict in evidence does not warrant reversal of judgment of the trial court.

10. Marriage ⚿50(1)

In estate proceeding wherein two persons claimed to be decedent's surviving wife and sought appointment as administratrix, evidence failed to sustain contention of alleged first wife of decedent who did not bring action to have alleged second marriage annulled, that decedent changed his name and then committed bigamy. Civ.Code, § 83, subd. 2.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of George E. Borneman, also known as George E. Stewart and George Stewart, deceased, wherein Delia Stewart filed a petition for admission of will to probate and for appointment as administratrix, and wherein Margaret Borneman filed a petition asking that the will be admitted to probate and that letters of administration with the will annexed be issued to her. From an order granting the petition of Delia Stewart, Margaret Borneman appeals under the alternative method.

Affirmed.

I. F. Chapman and Tom F. Chapman, both of San Francisco, for appellant.

Willard Lee Pope, of San Francisco, for respondent.

STURTEVANT, Justice.

On August 4, 1938, in San Francisco, a man died leaving an olographic will in words and figures as follows:

"San Francisco January 3, 1938.

"I George Stewart want my wife Delia Stewart to have everything I own including the money in the San Francisco Bank.
"George Stewart".

On August 31, 1938, Delia Stewart filed a petition asking that the will be admitted to probate and that, as surviving wife of the decedent, she be appointed administratrix. On September 27, 1938, Margaret Borneman filed a petition in which she alleged the true name of the decedent was George E. Borneman and that she was his surviving wife. She asked that the will be admitted to probate and that letters of administration with the will annexed be issued to her. Notice of the hearing of each petition was duly given and both came on for a hearing on the same date. Later the trial court made an order granting the petition first mentioned and denying the second. From that order Margaret Borneman has appealed under the alternative method.

Before making the order appealed from the trial court made findings, among others: "(4) That the petitioner Delia Stewart married the decedent at San Jose, California, on or about May 21, 1919; that at the date of said marriage the decedent was not married to the petitioner, Margaret Borneman. (5) That the petitioner Delia Stewart is the surviving wife of the decedent; * * * (6) That the petitioner Margaret Borneman is not the surviving wife of said decedent." The appellant attacks each of those findings.

In addition to the facts recited above the transcript discloses that at San Francisco in 1895 George E. Borneman and Maggie E. Neary were married. Although this petitioner Margaret Borneman did not so testify we will assume for the purposes of this decision that she was formerly Maggie E. Neary. In 1912, while the Bornemans were at Portland, Oregon, Mr. Borneman left the petitioner and went to live with a Miss Stewart. In 1914 he left Portland and came to San Francisco. In 1915 Mrs. Borneman and her two sons came to San Francisco. Mrs. Borneman did not testify that after the separation in 1912 she ever saw her husband or that any communications passed between them. She testified her sons saw and spoke to him, but she gave no dates. One son did not appear as a witness. The other son did. He testified he saw the decedent in 1922. He did not claim he ever saw him or communicated with him at any other time between 1912 and 1922. There is not a word in the record to the effect that from 1912 until 1937 the decedent knew that petitioner, Margaret Borneman, was alive, and if she were living where she resided. On May 21, 1919, at San Jose, the decedent applied to the county clerk for a license to marry Delia Johnson. In his written application he stated his name was George E. Stewart, that he had been married, and that he was "widowed". The license was issued and the decedent and Delia Johnson, the other petitioner, were duly married and thereafter lived together as man and wife down to the date of his death. On the trial Mrs.

Borneman produced a photograph which she testified Mr. Borneman gave her many years before. She testified it was a photograph of him. Mrs. Stewart testified it was a photograph of Mr. Stewart.

[1-3] Mrs. Borneman attacks the findings hereinabove set forth and claims that the marriage of Mr. and Mrs. Stewart was invalid and void. We think that claim may not be sustained. Section 61 of the Civil Code provides: "A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless: * * * 2. Unless such former husband or wife is *absent* and not *known* to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or *believed* by such person to be dead at the time such subsequent marriage was contracted. In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal." (Italics ours.) The marriage dated May 21, 1919 having been duly proved, the presumption of its validity is very strong. Wilcox v. Wilcox, 171 Cal. 770, 774, 155 P. 95. In Hunter v. Hunter, 111 Cal. 261, at page 267, 43 P. 756, at page 757, 31 L.R.A. 411, 52 Am.St.Rep. 180, the court said: "Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years; or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative,—that the first marriage had not ended before the second marriage." That rule has been repeated and followed in many cases. 26 Cal. Law Review, 270, and cases cited. Mrs. Borneman says, in effect, that Mr. Borneman *left* her at Portland and that he, and not she, was the "absent" one and therefore section 61 of the Civil Code has no application. That statement rests solely on her testimony that Mr. Borneman *left* her. But the trial court was not bound to believe her testimony. Davis v. Judson, 159 Cal. 121, 128, 113 P. 147. A consideration of the facts hereinabove set forth leads one to agree with the trial court's intimations that Mrs. Borneman did not testify truly. Therefore the second marriage under the facts of this case was valid. The record does not directly show what Mr. Stewart (Mr. Borneman) *knew* about the continuation of the life of his first wife on May 21, 1919. His statement to the county clerk, when applying for a license to marry Delia Johnson, that he was "widowed" is some evidence of what he *believed.* Therefore the trial court was authorized in presuming that on said date the applicant *believed* his first wife was dead.

[4] But the holding of the trial court was not erroneous if it be assumed that section 61 of the Civil Code was not applicable. Under the common law a subsequent marriage contracted by any person during the life of a former husband or wife of such person other than such husband or wife is illegal and void from the beginning unless the former marriage has been annulled or dissolved. But, at common law, the rule stated in the Hunter case obtained. Rex v. Twyning, 106 Reprint, 407. Viewing this case under the rules of the common law the same result must be reached.

[5-9] In 38 Cal.Jur. 1328, the author says: "In the case of conflicting marriages of the same spouse, the presumption of validity operates in favor of the second marriage. Accordingly the burden of showing the validity of the first marriage is on the party asserting it, and even where this is established it may be presumed in favor of the second marriage that at the time thereof the first marriage had been dissolved either by a decree of divorce or by the death of the former spouse, so as to cast the burden of adducing evidence to the contrary on the party attacking the second marriage." For the purpose of showing that her marriage to George Borneman had not been dissolved or annulled, Mrs. Borneman testified she had never commenced an action to obtain that relief and that she had never been served with papers in such an action commenced by her husband. She also introduced evidence that the records in San Francisco contained no record of such an action. But there was no evidence showing the residence of Mr. Borneman or of Mr. Stewart from the year 1912 down to 1938 except the mere fact that Mr. Stewart resided in San Francisco at the time of his death. That proof was insufficient to rebut the presumption of innocence. Everett v. Standard

Acc. Ins. Co., 45 Cal.App. 332, 336, 187 P. 996; Marsh v. Marsh, 79 Cal.App. 560, 567, 250 P. 411. The burden rested on Mrs. Borneman to introduce such evidence as would convince the mind of the trial court that the first marriage had not been dissolved. Estate of Chandler, 113 Cal.App. 630, 636, 299 P. 110. This apparently she did not do. The most she did was to create a conflict in the evidence but a mere conflict in the evidence will not warrant a reversal. It follows that whether the case is measured by the rules at common law or by the terms of the statute Mrs. Borneman did not sustain the allegations of her pleadings.

[10] In all we have said above we have acted on the assumption that Borneman and Stewart were one and the same individual. That assumption is far from being clear. It is directly controverted by the statements made by Stewart in his application to marry Delia Johnson. Borneman was in San Francisco in 1895 when he married Maggie E. Neary. No disinterested witness was called to testify Borneman was later known as Stewart. Mrs. Borneman did not claim she ever saw her husband after they separated at Portland. She testified that when he arrived in San Francisco he called on her sister. But that sister was not called as a witness. She testified her sons saw her husband. But one of the sons she did not call. She would have the trial court understand that her husband, herself, and both sons lived in San Francisco from 1915 to 1938, but during that time she made no claim she was the wife of the decedent nor entitled to support from him. Nor is there any evidence she commenced an action, as she had a right to do, to have the second marriage annulled. Civ.Code, § 83, subd. 2. Not until one year prior to the death of the decedent did one of her sons learn of the fact of the second marriage. Not until Stewart was dead did his alleged sons call at his home or claim they were his sons. It suffices to say that such facts do not support the contention that the decedent changed his name from Borneman to Stewart and then committed bigamy.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

---

35 Cal.App.2d 556

In re CAZAURANG'S ESTATE.

HOFFMAN et al. v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 2469.

District Court of Appeal, Fourth District, California.

Nov. 21, 1939.

1. Wills 🔑218

Where it appeared that objections to the probate of a will were filed, that contestant subsequently died, that no substitution had been made of her personal representative, that personal representative later filed another contest of such will, that service of citation had not been completed, and that such matter was not at issue, court was without jurisdiction to admit will to probate.

2. Abatement and revival 🔑71

A court is without jurisdiction to proceed when one of the parties before it has died and there has been no substitution of any representative of the deceased.

◆

Proceeding in the matter of the estate of Jean Cazaurang, also known as J. Cazaurang, also known as John Cazaurang, deceased, on the petition of Win E. Hoffman, as executor of the last will of Marie Cazaurang, deceased, and Jean B. Ganchou against the Superior Court of the State of California in and for the County of San Diego, and the Honorable Edward J. Kelly, Judge of such court, for a writ of prohibition.

Peremptory writ directed to issue.

A. M. Thompson and H. J. Bischoff, both of San Diego, for petitioners.

Porter C. Blackburn, of Los Angeles, Dempster McKee, of San Diego, and Marion P. Betty, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

It appears from the petition that Jean Cazaurang died on June 15, 1929. His widow, Marie Cazaurang, offered for probate a will dated April 25, 1928. One Marie Lees offered for probate as a will two instruments signed by Jean Cazaurang on June 11, 1927 and February 2, 1929, which will be herein referred to as the

"Lees" will. Another will dated March 5, 1929, known as the "Carrey" will, was also offered for probate.

On October 15, 1936, Marie Cazaurang filed written objections to the probate of the Lees will. On April 12, 1937, Marie Cazaurang died and one of the petitioners herein was later appointed executor of her will. On October 24, 1939, the petitioners herein filed a written contest to the probate of the Lees will, causing a citation to be issued directed to all persons known to be interested in the estate of Jean Cazaurang. Before this citation was served on the persons named therein the respondent court, while hearing another contest of the Carrey will, proceeded to also hear the petition for probate of the Lees will. This was done over the objection of these petitioners, and before the citation in the contest filed by them had been served on the necessary parties. After evidence was thus received in support of the petition to probate the Lees will, but no evidence having been received or offered in connection with the contest of said will, the court held that the Carrey will had been executed under undue influence, that the Lees will should be admitted to probate, and ordered written findings of fact and conclusions of law to be prepared by counsel for the proponent of the Lees will.

This proceeding followed and the matter is submitted here upon the petition and upon a demurrer thereto interposed in behalf of the respondents.

[1] It thus appears that objections to the probate of the Lees will were filed by Marie Cazaurang, that she is dead, and that no substitution has been made of her personal representative. It further appears that her personal representative later filed another contest of the Lees will, that service of citation therein has not been completed and that that matter is not yet in issue. Under these circumstances, the court is without jurisdiction to admit to probate the will offered by Marie Lees until the contest filed is brought to issue and heard.

[2] A court is without jurisdiction to proceed when one of the parties before it has died and there has been no substitution of any representative of the deceased. Boyd v. Lancaster, 32 Cal.App.2d 574, 90 P.2d 317; Maxon v. Avery, 32 Cal.App.2d 300, 89 P.2d 684. While we are limited in the present proceeding by the terms of the original writ, it may be suggested that the personal representative of Marie Cazaurang should be substituted with respect to the original objections filed by her, in order to obviate the possibility of a further delay by the raising of that point at some future time.

The peremptory writ will issue.

I concur: MARKS, J.

---

35 Cal.App.2d 559

KELLY v. LIDDICOAT et al.

Civ. 10868.

District Court of Appeal, First District, Division 1, California.

Nov. 22, 1939.

1. Appeal and error 🔑949

Ordinarily, the only question presented on appeal from a summary judgment is whether or not the trial court abused its discretion. Code Civ.Proc. § 437c.

2. Judgment 🔑186

A motion for summary judgment is not a trial on the merits but it is merely to determine whether there is an issue to be tried. Code Civ.Proc. § 437c.

3. Judgment 🔑185

The statement in defendant's affidavit in opposition to motion for summary judgment must be of evidentiary and not of ultimate facts and they must be accepted as true for purposes of the motion. Code Civ.Proc. § 437c.

4. Appeal and error 🔑544(1)

On appeal on judgment roll alone from summary judgment in action on notes, defendants were not entitled to urge on appeal sufficiency of amended answer, since sufficiency of pleading could not have been urged to defeat motion in trial court. Code Civ.Proc. § 437c.

5. Judgment 🔑185

In action on note, entry of summary judgment on motion was not error on ground that order sustaining demurrer to amended answer precluded defendant from filing affidavit in opposition to motion as to special defense, since demurrer could be interposed to answer and motion could be made for summary judgment at the same time; the demurrer being an attack on the sufficiency of the pleading as such, and the motion being a direct challenge to the substantiality of the defense. Code Civ.Proc. § 437c.

6. Pleading ⚿218(5)

The trial court has power to change ruling on demurrer during progress of trial.

7. Appeal and error ⚿544(1)

On appeal on judgment roll alone from summary judgment in action on notes, contention that entry of judgment was error because of order sustaining demurrer to answer which precluded defendant from filing affidavit as to special defense in opposition to motion for summary judgment was not available on appeal, especially since for all that appeared from record, trial court might have set aside order sustaining demurrer in which event it could not be claimed that no answer remained in the case. Code Civ.Proc. § 437c.

8. Appeal and error ⚿901

On appeal on judgment roll alone from summary judgment in action on notes, it was incumbent upon appellant to make it affirmatively appear that error was committed by the trial court. Code Civ.Proc. § 437c.

9. Appeal and error ⚿934(1)

All intendments will be made in support of a judgment and all proceedings necessary to its validity will be presumed to have been legally taken and if any matters could have been presented to trial court which would have authorized entry of judgment, it will be presumed on appeal in support of judgment that such matters were presented and that judgment was entered in accordance therewith.

10. Judgment ⚿186

In action on notes, entry of summary judgment on plaintiff's motion was proper, where no opposition was made to entry of judgment although counsel for defendant appeared at hearing, and defendants did not challenge sufficiency of plaintiff's showing on the motion. Code Civ.Proc. § 437c.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action on promissory notes by V. Kelly against W. J. Liddicoat and another. From a summary judgment in favor of the plaintiff, defendants appeal.

Affirmed.

A. D. Schaffer, of San Francisco, for appellants.

Frank V. Campbell and Harvey C. Miller, both of San Jose, for respondent.

GOODELL, Justice pro tem.

This is an appeal on the judgment roll alone from a summary judgment in an action brought upon three promissory notes.

[1, 2] The statutory affidavit which accompanied the notice of motion showed that the plaintiff's assignor had sold certain corporate stock to the appellants and that the notes, aggregating $1,125, had been executed by appellants to evidence the money obligation for the stock. Section 437c, Code of Civil Procedure, provides that "the answer may be stricken out and judgment may be entered, in the discretion of the court, unless the defendant, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend". The appellants filed no affidavits and made no opposition to the entry of judgment although they were represented by counsel at the hearing. Ordinarily the only question presented upon an appeal from a summary judgment under section 437c is whether or not the trial court abused its discretion. Bank of America Nat. Trust & Savings Ass'n v. Oil Well Supply Co., 12 Cal.App.2d 265, 270, 55 P.2d 885. The appellants, however, attack the judgment upon an entirely different ground, their opening brief being devoted to showing that their third amended answer is legally sufficient as a pleading, and they contend that on this appeal there should be a review of the trial court's action in sustaining the demurrer to said answer the same as there could be on an appeal from a judgment after a trial on the merits. In this contention they lose sight of the real intent and purpose of this legislation. "While this section provides a form of procedure that is novel in this state, it is the same in general effect, but with some variations in details, as rules of practice established in New York and New Jersey, which require a defendant, on plaintiff's motion for judgment, to file in addition to his answer an

affidavit showing 'such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend.'" Cowan Oil & Refining Co. v. Miley Petroleum Corp., 112 Cal.App.Supp. 773, 776, 295 P. 504, 505, wherein section 831d, Code of Civil Procedure—of which section 437c is an outgrowth and extension—was under discussion. The District of Columbia has a similar rule and with respect to it the Supreme Court of the United States has said: "It prescribes the means of making an issue. * * * The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands." Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320, 23 S.Ct. 120, 122, 47 L.Ed. 194, 198. With respect to the rule in New York, its Court of Appeals in Curry v. Mackenzie, 239 N.Y. 267, 146 N.E. 375, has said: "Civil practice rule 113 permits summary judgment at times in favor of a plaintiff, though material averments of his complaint have been traversed by the answer. To that end there must be supporting affidavits proving the cause of action, and that clearly and completely, by affiants who speak with knowledge. There must be a failure on the part of the defendant to satisfy the court 'by affidavit or other proof' that there is any basis for his denial or any truth in his defense. The case must take the usual course, if less than this appears. To justify a departure from that course and the award of summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried." In the case of Rogan v. Cons. Coppermines Co., 117 Misc. 718, 193 N.Y.S. 163, 164, Judge Irving Lehman (now of the Court of Appeals) said: "Rule 113 of the Rules of Civil Practice was intended to prevent a defendant in certain classes of cases, which for convenience I may call commercial cases, from interposing an answer which will unnecessarily delay the entry of a judgment to which the plaintiff is entitled." In Hanna v. Mitchell, 1922, 202 App.Div. 504, 514, 196 N.Y.S. 43, 52, in treating of a conflict made by contrary affidavits in a proceeding for summary judgment, the opinion reads: "The court is not authorized to try the issue, but is to determine whether there is an issue to be tried." In Baxter v. Szucs, 248 Mich. 672, 675, 227 N.W. 666, 667, the court said: "The province of the court, on motion for summary judgment, is to determine judicially whether there is an issue of fact which, if resolved in favor of defendant, would preclude a verdict for plaintiff in whole or in part of his demand." In our own state, in Shea v. Leonis, 29 Cal.App.2d 184, 187, 84 P.2d 277, 279, it is said: "A motion for summary judgment is not a trial upon the merits. It is merely to determine whether there is an issue to be tried." In the Cowan case, supra (see 112 Cal.App.Supp. page 778, 295 P. page 506), the appellant contended that "an answer which states and properly pleads a good defense cannot be stricken out", and that "a judgment upon the pleadings cannot be given if the answer presents any material issue on the allegations of the complaint or sets up any affirmative matter constituting a defense". That, essentially, is what these appellants now claim when they urge the sufficiency of their answer as a pleading. With respect to the claim there urged and the cases cited, the court, in the Cowan case, said: "None of these cases, however, involve any such provision as that found in section 831d. That section provides an entirely new procedure, as far as the Codes of our state are concerned, the purpose of which is to eliminate all issues which have no basis in fact, no matter how well they may be pleaded in form. Under it, an answer may be stricken out, even though a perfect defense may be stated therein, unless the defendant by his affidavits shows facts to substantiate the defense." And in Perlman v. Perlman, 235 App.Div. 313, 257 N.Y.S. 48, 50, the court, expressing the same thought conversely, said with respect to summary judgments: "Even though the pleading itself be deemed insufficient, the motion must be denied if the affidavits show facts sufficient to constitute a defense entitling the pleader to defend. Curry v. Mackenzie, 239 N.Y. 267, 146 N.E. 375. * * *"

Section 437c, after prescribing with particularity what the plaintiff's affidavits on the motion should contain and by whom they should be made, provides that "The affidavit or affidavits in opposition to said motion shall be made by the defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the defendant has a good and substantial defense to the plaintiff's action (or to a portion thereof) upon the merits. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto."

[3, 4] It has been held that the statements in the affidavits must be of evidentiary, and not of ultimate, facts, and they must be accepted as true for the purposes of the motion. Cowan case, supra, 112 Cal.App.Supp. page 780, 295 P. 504; Krieger v. Dennie, 123 Cal.App.Supp. 777, 780, 10 P.2d 820; Bank of America Nat. Trust & Savings Assn. v. Casady, 15 Cal. App.2d 163, 168, 59 P.2d 444. From all these authorities it is clear that the appellants could not have urged the sufficiency of their pleading to defeat the motion in the trial court. If they could not have done so there, they cannot do so now.

[5-9] In their closing brief the appellants for the first time present the contention that "The order sustaining demurrer precluded appellants from filing affidavits as to the special defense, in opposition to respondent's motion for summary judgment, and thus deprived appellants of the benefit of the special defense."

The appellants had filed an answer and three amended answers. On February 2, 1938, the court sustained the demurrer to their third amended answer, the order being silent as to the right of further amendment and the time therefor. On February 14, 1938, notice of this motion was given. Between February 2d, when the demurrer was sustained, and February 28th, when this motion was heard, the record discloses no attempt on the part of appellants to amend their answer, and none on the part of the respondent to have judgment entered on the sustaining of the demurrer. In appellants' closing brief it is argued for the first time that the sustaining of the demurrer left "no issues raised by the special defense before the Court" and that if the case had gone to trial in that state of the pleadings no evidence would have been admissible on the special defense. There would seem to be no reason why a demurrer could not be interposed to an answer and a motion made for a summary judgment at the same time, the demurrer being an attack upon the sufficiency of the pleading as such, and the motion being a direct challenge to the substantiality of the defense, regardless of how well it is pleaded. Each would be independent of the other, and it would seem to be a matter of small importance which was first acted upon. In the case of LeBreton v. Stanley Contracting Co., 15 Cal.App. 429, 114 P. 1028, 1030, a demurrer and a motion for judgment on the pleadings were before the court at the same time and the court sustained the demurrer without leave to amend and later granted the motion. It was there urged "that the order sustaining the demurrer without leave to amend practically disposed of the entire case, and thereby precluded the court from entertaining and disposing of the motion for judgment on the pleadings". This court held that "The plaintiff in this case was privileged to take advantage of the alleged defect in the defendants' pleading by demurrer or motion for judgment * * * either or both of which, if successful, would be sufficient upon which to found a judgment." In the case at bar, however, the order did not cut off the appellants' right to amend; there had been neither amendment nor judgment, and in that period of suspension the motion in question was heard and granted. The point now suggested could not have been made if the motion for summary judgment had been granted before the demurrer had been sustained.. Moreover, there is nothing final about the order sustaining the demurrer. "It is a most common occurrence," says the court in De La Beckwith v. Superior Court, 146 Cal. 496, 499, 80 P. 717, 718, "for a trial court to change its rulings during the progress of a trial upon questions of law, and no one would contend that it is not within its power to do so, or that it should not do so when satisfied that the former ruling was erroneous. A ruling on demurrer occupies no better position, in this regard, than any other ruling from which an appeal could not be taken, and has frequently been disregarded when the same point subsequently arose in the same case in another way." In the last-cited case there is a full and comprehensive discussion of the subject. Other cases holding the same way are Wrightson v. Dougherty, 5 Cal.2d 257, 265, 54 P.2d 13; Estate of Rawson, 66 Cal.App. 144, 145, 225 P. 474 (where an order made upon demurrer is termed "an intermediate order or ruling"); People v. Lucas, 78 Cal. App. 421, 425, 248 P. 691; O'Neill v. Hicks, 101 Cal.App. 374, 375, 281 P. 531 (where an order sustaining a demurrer is likened "to any other order made during the progress of the case, which may, if further light be shed upon the subject, be reversed or modified"); City of Los Angeles v. Oliver, 102 Cal.App. 299, 326, 283 P. 298; Howe v. Board of Supervisors, 118 Cal.App. 306, 309, 5 P.2d 28; Timm v. McCartney, 9 Cal.App.2d 230, 232, 49 P.2d 315. For all that appears from the record (the appeal being upon the judgment roll alone) the trial court might have set aside its order sustaining the demurrer, in which event it could not be claimed, as it now is, in effect, that no answer remained in the case. On this appeal, as on any other, "It is incumbent upon the appellant to make it affirmatively appear that error was committed by the court below" (Cockrill v. Clyma, 98 Cal. 123, 126, 32 P. 888, 889); "all intendments will be made in support of the judgment and all proceedings necessary to its validity will be presumed to have been regularly taken. * * * If any matters could have been presented to the court below which would have authorized the entry of this judgment, it will be presumed on this appeal, in support of the judgment, that such matters were so presented, and that the judgment was entered in accordance therewith." Caruthers v. Hensley, 90 Cal. 559, 560, 27 P. 411. See, also, Parker v. Altschul, 60 Cal. 380; Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 P. 361; Hawley v. Gray Bros., etc., Co., 127 Cal. 560, 60 P. 437; Canadian & American Mortgage & Trust Co. v. Clarita Land & Inv. Co., 140 Cal. 672, 74 P. 301; Rooney v. Gray, 145 Cal. 753, 79 P. 523.

[10] After all, it must be remembered that the judgment in this case shows that there was no opposition to its entry, although counsel for appellants appeared at the hearing. Moreover, appellants do not challenge the sufficiency of the respondent's showing, on the motion. Their failure to file affidavits or otherwise oppose the motion indicates that they were utterly unable to make the showing of a substantial and meritorious defense as required by section 437c and this language found in Bank of America National Trust & Savings Ass'n v. Oil Well Supply Co., 12 Cal.App.2d 265, 270, 55 P.2d 885, 888, seems to be particularly applicable to this case: "It was the defendant's privilege, under section 437c of the Code of Civil Procedure, to set forth the claim, by proper averments, that there was available at least the semblance of a defense; having failed to do this the trial court justly concluded that there was no defense to the action."

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

---

35 Cal.App.2d 495

PEOPLE v. FLUMERFELT et al.

Cr. 3252.

District Court of Appeal, Second District, Division 2, California.

Nov. 17, 1939.

1. Criminal law ⚷404(4)

In prosecution for theft wherein defendants obtained money from complaining witness by representation that money was to be used to buy gold in Mexico and wherein it appeared that complaining witness had attached bar of spurious gold which had been shown him by defendants on which occasion defendants made statements indicating guilt, admission in evidence of bar of spurious gold was not error, since it was proper for prosecution to present circumstances under which statements were made.

2. Licenses ⚷42(4)

In prosecution for violation of Corporate Securities Act by knowingly selling capital stock in gold dredging company without permit, ruling sustaining objections to testimony of defendant that prior to selling stock she had instructed her attorney to obtain permit and attorney had informed her that permit had been granted was error. St. 1931, p. 950, § 18.

3. Licenses ⚷42(4)

In prosecution for violation of Corporate Securities Act by knowingly selling capital stock in corporation without permit, rule that person who has committed criminal act cannot excuse herself by claiming ignorance of law did not justify ruling excluding evidence that prior to selling stock, defendant had instructed attorney to obtain permit and attorney had informed her that permit had been granted; since defense was not based on ignorance of law but on misinformation as to the facts. St.1931, p. 950, § 18; Pen.Code, § 7, subd. 5.

4. Licenses 🔑40

Seller of stock in corporation without permit who had been informed by her attorney that permit to sell stock had been issued and who in good faith acted on such information was not guilty of "knowingly" selling stock in violation of Corporate Securities Act. St.1931, p. 950, § 18; Pen.Code, § 7, subd. 5.

[Ed. Note.—For other definitions of "Knowingly," see **Words & Phrases.**]

5. Licenses 🔑42(5)

In prosecution for violation of Corporate Securities Act by knowingly selling stock without permit wherein defendant offered to prove that prior to selling stock, she had instructed attorney to obtain permit and that she had been informed that permit had been granted, whether defendant received information that permit had been issued and in good faith acted on the information were questions for determination by trier of facts. St.1931, p. 950, § 18; Pen.Code, § 7, subd. 5.

6. Criminal law 🔑24

The term "knowingly" means "with knowledge" and when used in a prohibitory statute is generally held to refer to knowledge of the essential facts, and from such knowledge of the facts, the law presumes the knowledge of legal consequences arising from the performance of the prohibited act. Pen.Code, § 7, subd. 5.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Percy Flumerfelt and Helen Ardelle were convicted of grand theft, and Helen Ardelle was convicted of violation of the Corporate Securities Act, and from the judgments of conviction and orders denying their motions for new trial they appeal.

Judgments of conviction of grand theft and orders denying motion for new trial affirmed in prosecutions for grand theft and conviction of Helen Ardelle for violation of the Corporate Securities Act, and motion of Helen Ardelle for new trial therein reversed, and new trial ordered.

Harry W. Dudley and J. H. Morris, both of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendants Flumerfelt and Ardelle were convicted of the crime of grand theft at a trial before the court without a jury. Both defendants appeal from the judgment of conviction and from the order denying their motion for a new trial. At the same trial defendant Ardelle was convicted of the crime of violating the Corporate Securities Act, St.1917, p. 673, and she has appealed from the judgment and from the order denying her motion for a new trial.

From the evidence presented by the prosecution it appears that defendant Ardelle sold to Dr. A. G. Tibbetts for the sum of $2,000 stock in Acme Gold Dredging Company, a corporation, which, according to the representations of said defendant, owned a placer mine in the northern part of California. Thereafter both defendants told Dr. Tibbetts that they were buyers and sellers of gold in Mexico, that they had been in that business for a number of years and needed money to conduct the business. Thereupon Dr. Tibbetts delivered to defendant Ardelle the sum of $450. Thereafter defendants told Dr. Tibbetts that the gold in Mexico had accumulated to such an extent that they did not have enough money to handle it. At their request Dr. Tibbetts delivered to them the sum of $2,000 on July 16, 1936. About five weeks later defendants returned to Los Angeles and told Dr. Tibbetts that they had run across some Indians in Mexico who had more gold than they had ever dreamed of, defendant saying "and inside there were Indians standing all around the room, and in one corner, on the floor, there were sacks and bars of gold". Defendants told Dr. Tibbetts that they could not get any of the bars of gold because the Indians would not sell less than $25,000 worth at a time and that they had returned to raise this sum. They told Dr. Tibbetts that $7,000 was the lowest sum that they would need to handle the matter. Dr. Tibbetts then became suspicious and demanded the return of his money. The sum of $400 only was returned. About two weeks later defendant Ardelle telegraphed Dr. Tibbetts requesting him to meet her at the Glendale airport. On the drive from the airport to her hotel defendant Ardelle opened her handbag and displayed what she said was one of the gold bars of which she had spoken previously, stating that it was valued at from $7,000 to $8,000. It was arranged that defendants should show the gold bar to Mrs. Tibbetts at her residence the following day. Dr. Tibbetts consulted a lawyer, who filed suit and made arrangements to attach the gold bar when it was brought to the Tibbetts residence. When the bar was brought to the Tibbetts residence a deputy sheriff seized it. After the deputy left defendant Ardelle turned to Dr. Tibbetts and said: "Do you realize what you have done? You are sending us to prison". Defendant Flumerfelt approached Dr. Tibbetts and said: "I could choke you and choke you and choke you until you are dead". However, no choking took place and shortly thereafter defendants departed. The bar which was attached was not gold.

[1] In regard to the charge of grand theft the only contention made by defendants on this appeal is that the court erred in admitting in evidence the bar which was seized by the sheriff under the writ of attachment, it being claimed that the bar was not seen by Dr. Tibbetts until after he had delivered the funds to defendants. There is no merit in this contention. The statements made by defendants after the bar was seized by the sheriff were admissible as indicating guilt of the offense for which they were on trial and it was proper for the prosecution to present to the court the circumstances under which the statements were made. Although it was not necessary to present the bar in court we cannot perceive how defendants were prejudiced by the presentation of the spurious bar to the judge presiding at the trial.

[2-4] In defense of the charge that she violated the Corporate Securities Act by knowingly issuing and selling three per cent of the capital stock in Acme Gold Dredging Company without having first received a permit from the Corporation Commissioner, defendant Ardelle offered to prove that prior to selling the stock she had instructed her attorney, Mr. Doran, to obtain a permit for the issuance and sale of the stock and that she had been informed by him that a permit had been granted. The ruling of the trial court in sustaining an objection to the offer of proof was erroneous. Section 18 of the Corporate Securities Act, St.1931, p. 950, as it was in force at the time of the transaction involved herein, was in part as follows: "Every officer, agent, or employee of any company and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells * * * any security * * * contrary to the provisions of this act * * * shall be punished * * *". It will be noted that the section in question makes it a criminal offense to knowingly sell the stock without the necessary permit. In section 7 of the Penal Code subd. 5 it is provided: "The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission". The rule that one who has committed a criminal act cannot excuse herself by claiming ignorance of the law does not justify the court's ruling, for defendant does not base her defense upon ignorance of the law but rather upon misinformation as to the facts. She tried to prove that in selling the stock she acted upon information which had been imparted to her that the permit had in fact been issued. If she was informed by her attorney that a permit to sell the stock in question had been issued and in good faith acted upon such information it cannot be successfully contended that she knowingly sold the stock in violation of the Corporate Securities Act. Whether she received information that a permit had been issued and in good faith acted upon the information were questions for the determination of the trial court upon proper proof.

[5, 6] The prosecution relies upon People v. McCalla, 63 Cal.App. 783, 220 P. 436, 440, but the facts of that case are easily distinguishable from the facts of the case now before us. There the defendant relied upon the advice of counsel that the instrument involved was not a "security" as defined by the Corporate Securities Act. It is significant that the court in holding that advice of counsel and a mistaken belief that the instrument was not a security within the meaning of the Act did not constitute a valid defense, stated: "The term 'knowingly' means 'with knowledge,' and when used in a prohibitory statute is usually held to refer to a knowledge of the essential facts; and from such knowledge of the facts the law presumes a knowledge of the legal consequences arising from the performance of the prohibited act."

The judgments of conviction of the crime of grand theft, Superior Court action No. 73555, and the order denying the motions of defendants for a new trial in said action are affirmed. The judgment of conviction in Superior Court action No. 73554, by which defendant Ardelle was convicted of the crime of violation of the Corporate Securities Act, and the motion of said defendant for a new trial in said action are reversed and a new trial is ordered.

We concur: MOORE, P. J.; McCOMB, J.

---

35 Cal.App.2d 629

MORAN v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY.

Civ. 6351.

District Court of Appeal, Third District, California.

Nov. 27, 1939.

Hearing Denied Jan. 25, 1940.

1. Divorce 🔑165(5)

An order vacating an order setting aside an interlocutory divorce decree was valid, notwithstanding failure of notice of motion therefor to state statutory grounds for vacation of the earlier order, and hence trial court lacked jurisdiction to make, without notice, a third order setting it aside. Code Civ.Proc. § 473.

2. Motions 🔑59(1)

In determining validity of order setting aside another order, the same test should be applied as in determining validity of judgment.

3. Judgment 🔑503

Though it is essential to jurisdiction that there be some proper application invoking the court's judicial power, mere failure to state cause of action does not render judgment void and subject to collateral attack where complaint shows a subject matter and demand for relief within the court's jurisdiction.

4. Judgment 🔑503

The rule that judgment is not void if court has jurisdiction of the parties and subject matter, irrespective of whether complaint states a cause of action, so long as it apprises defendant of the nature of plaintiff's demand, is applicable to contested cases and to default judgments valid in other respects.

5. Motions 🔑59(1)

Only an order that is void on its face may be set aside by the court on its own motion.

6. Judgment 🔑340

Unless invalidity of judgment is apparent from inspection of judgment roll, the court rendering it has no power to make any order vacating it or setting it aside, in absence of application pursuant to statute, and sole remedy of aggrieved party is in a new action on the equity side of the court. Code Civ.Proc. § 473.

Certiorari proceedings by Arthur B. Moran against the Superior Court of the state of California in and for the County of Sacramento, to annul an order setting aside and vacating an order vacating and setting aside an interlocutory decree of divorce.

Order annulled.

Prior opinion, 94 P.2d 1015.

Johnson & Curtright, of Sacramento, for petitioner.

McAllister & Johnson and O. F. Meldon, all of Sacramento, and A. C. McClellan, of Hanford, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

Petition for writ of certiorari to annul an order setting aside and vacating an order vacating and setting aside an interlocutory decree of divorce.

A rehearing was granted herein for the purpose of examining numerous authorities which the parties did not present originally.

As alleged in the petition, the action in which the order here assailed was entered is one for divorce, commenced against petitioner by his alleged wife, upon the grounds of extreme cruelty. The issues upon the divorce complaint having been settled, the respondent court proceeded to a trial of the action, as a result of which an interlocutory decree of divorce was given, made, and caused to be entered on March 3, 1939. Petitioner thereafter, and on July 6, 1939, caused to be served and filed a notice of motion to vacate the interlocutory decree, to reopen the cause, for leave to file an amendment to this petitioner's answer in the form of a cross-complaint for an annullment of marriage, and for leave to offer evidence in support of said cross-complaint. The cross-complaint alleged, as a ground for annullment of the marriage between the parties, that at the time of said marriage plaintiff was the wife of one Paul R. Henricks (then living). This motion came on regularly for hearing, which plaintiff in the divorce case, and her counsel, and petitioner and his counsel all attended. The motion to vacate the interlocutory decree was thereupon made, and witnesses were sworn and examined, and two depositions were read in support of the motion. The matter was then argued to the court, the authorities then quoted and cited, and the motion was submitted for consideration and decision. The respondent court, upon such submission, then granted the motion, vacated the judgment, and granted leave to petitioner to file the proposed cross-complaint. Thereafter, pursuant to the leave granted, petitioner served and filed his cross-complaint, to which plaintiff answered, and upon memorandum and motion for the purpose, the cause was regularly set down for trial on the cross-complaint and answer thereto.

The cause came on regularly for trial, on the issues as thus fixed, on August 30, 1939, and the cause was tried on the issue of the validity of the marriage, and was submitted to the court on that sole issue. This trial took place without any objection whatever being made to the regularity thereof, nor to the validity of the order vacating the interlocutory decree. At no stage of the second hearing, nor at any time, was any motion or application of any kind made to vacate the order vacating said interlocutory decree, nor was any notice of any kind given to, or by either of the parties, or by the respondent court, or to anyone, that the vacation and setting aside of the order vacating said interlocutory decree was contemplated, considered, or intended. Neither was any hearing of any kind ever had at which was presented or considered the proposition of the vacation of such order.

After the submission of the cause, on September 8, 1939, and, as above pointed out, the court, without motion, notice or application, and without deciding any of the issues presented at the hearing of the cause, made its minute order vacating and setting aside the order of the 17th day of July, 1939, which last-mentioned order vacated and set aside the interlocutory decree. And it is this order nullifying the order vacating the interlocutory decree that is the subject of this application.

It is contended by petitioner that the order of the trial court setting aside and vacating its order vacating the interlocutory decree was without jurisdiction, and should therefore be annulled by this court. This contention is based, according to the points and authorities filed, upon the ground that the original order was valid upon its face. The order which the trial court set aside reads as follows:

> "Upon notice heretofore duly given, made, served and filed herein, and after a hearing in open court whereat McAllister and Johnson represented plaintiff, and Johnson & Curtright represented plaintiff (defendant), and good cause appearing therefor:
>
> "It is hereby ordered, adjudged and decreed that the interlocutory decree heretofore made and entered herein on the 3rd day of March, 1939, in Book 84, at page 574 Records of the County Clerk's Office of the County of Sacramento, State of California, be, and the same is hereby vacated and set aside, and the defendant, Arthur R. Moran, is hereby granted leave to file a cross-complaint in the above entitled action."

The view of petitioner in respect to the right of the court to set aside a void order is thus expressed by him:

> "It is to be conceded that an order wholly void upon its face, and requiring only an inspection of the judgment-roll to demonstrate its want of vitality, may be vacated and set aside by the court without notice. People v. Greene, 74 Cal. 400, 16 P. 197 [5 Am.St.Rep. 448]. Thus, if the order vacating the interlocutory decree itself disclosed the lack of jurisdiction in the court to make it, or, if its invalidity appears from an inspection of the judgment-roll, the court, in the exercise of its inherent power over its own judgment, could properly have set the order aside of its own motion."

[1, 2] In our original opinion we held that the order was void on its face, hence, the trial court properly disposed of it by setting it aside. A further examination of the law governing void judgments leads us now to the conclusion that the order was valid, and that the trial court lacked jurisdiction to make the order under attack. In determining the question as to whether

an order of this character is valid or void, the same test should be applied as where a judgment is subjected to that inquiry. 42 C.J. 557, § 272. Conceding, as respondent contends, that the notice of motion set forth above fails to state any of the grounds which would justify the vacation of the order under section 473 of the Code of Civil Procedure, it would appear, by following the rule relating to judgments, that this deficiency would not render the order made pursuant thereto, void on its face. In the case of Christerson v. French, 180 Cal. 523, 525, 526, 182 P. 27, 28, it is said:

"It is well established that a judgment is not void if the court has jurisdiction of the parties and of the subject-matter, irrespective of whether the complaint states a cause of action or not so long as it apprises the defendant of the nature of the plaintiff's demand. Blondeau v. Snyder, 95 Cal. 521, 31 P. 591; Mayo v. Ah Loy, 32 Cal. 477, 91 Am.Dec. 595; In re James, 99 Cal. 374, 33 P. 1122, 37 Am.St.Rep. 60; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 P. 301; Brush v. Smith, 141 Cal. 466, 75 P. 55; Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; Gillespie v. Fender, [180 Cal. 202] 180 P. 332; California Casket Co. v. McGinn, 10 Cal.App. 5, 109 P. 1077, 1079."

[3, 4] In Behrens v. Superior Court, 132 Cal.App. 704, pages 707, 708, 23 P.2d 428, 429, it is stated:

"In the recent case of Associated Oil Co. v. Mullin, 110 Cal.App. 385, 294 P. 421, 423, the law in relation to the questions which we are considering is so fully and conclusively set forth that we quote therefrom the following as decisive in this case: 'It is essential to jurisdiction that there be some proper application invoking the judicial power of the court in respect to the matters sought to be litigated (Young v. Rosenbaum, 39 Cal. 646; Tinn v. United States District Attorney, 148 Cal. 773, 84 P. 152, 113 Am.St.Rep. 354); but if a complaint shows a subject-matter and a demand for relief within the jurisdiction of the court, the mere fact that it fails to state a cause of action does not render the judgment void and subject to collateral attack (Gillespie v. Fender, 180 Cal. 202, 180 P. 332); or, as the rule is stated in Christerson v. French, 180 Cal. 523, 182 P. 27, a judgment is not void if the court has jurisdiction of the parties and subject-matter, irrespective of whether the complaint states a cause of action or not, so long as it apprises the defendant of the nature of plaintiff's demand. This rule applies both to contested cases (Le Mesnager v. Variel, 144 Cal. 463, 77 P. 988, 103 Am.St.Rep. 91), and to default judgments in other respects valid (Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; Christerson v. French, supra)."

[5, 6] We are of the opinion that the notice of motion here (by analogy, the complaint) comes within the above rule. The nature of the demand of the moving party is set forth, and the court had jurisdiction over the person of respondent. The order made pursuant to the notice of motion and the hearing thereon was therefore not void on its face, and the trial court exceeded its jurisdiction in vacating such order on its own motion. Only an order void on its face may be thus set aside. "The effect of these well-settled rules is that, unless the invalidity of a judgment is apparent from an inspection of the judgment roll, the court rendering it has no power, in the absence of application made within the time specified in section 473, Code of Civil Procedure, to make any order vacating or setting aside such judgment, and the sole remedy of the aggrieved party, who may not, in fact, have been served, is to be found in a new action on the equity side of the court. See Eichhoff v. Eichhoff, 107 Cal. 42, 40 P. 24, 48 Am.St.Rep. 110; People ex rel. Schwartz v. Temple [103 Cal. 447, 37 P. 414], supra." People v. Davis, 143 Cal. 673-675, 77 P. 651.

The order is annulled.

We concur: PULLEN, P. J.; THOMPSON, J.

35 Cal.App.2d 537

KOPPELMAN v. AMBASSADOR HOTEL CO. OF LOS ANGELES et al.

Civ. 12310.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1939.

Hearing Denied Jan. 18, 1940.

1. Negligence 🔑32(1)

The owner or occupant of a building who expressly or impliedly invites a person to come upon his premises must exercise ordinary care to render the premises reasonably safe.

2. Negligence 🔑32(2)

An invitation to use premises is inferred where there is a common interest or mutual advantage.

3. Negligence 🔑32(1)

The keeper of a public place of business must keep his premises and the passageways to and from it in a safe condition, and use ordinary care to avoid accident or injury to those properly entering upon the premises on business.

4. Negligence 🔑105

Where one goes upon premises of another without invitation and as a bare licensee, and the property owner passively acquiesces in his coming, the owner is not liable for negligence if an injury is sustained by reason of a mere defect in the premises, since such a one has taken all the risk upon himself.

5. Negligence 🔑32(1)

A property owner assumes no duty to one who is on his premises by permission only and as a mere licensee except that while on the premises no wanton or wilful injury shall be inflicted upon him.

6. Negligence 🔑32(2)

One who stands in no contractual relationship with the owner or occupant of a building, and is on the premises for purposes purely of his own, or a third party, which have no relation to the business of the owner or occupant, and in which the latter has no interest, beneficial or otherwise, is a bare "licensee."

[Ed. Note.—For other definitions of "Licensee," see Words & Phrases.]

7. Negligence 🔑32(3)

One who enters premises upon invitation may during his stay become a licensee as to certain portions and a trespasser as to others, with the rights and duties of the respective parties varying with each change of status.

8. Negligence 🔑32(3)

An invitee who enters upon portion of the premises where he has no right to enter becomes a "licensee," and the only duty to him then is to refrain from wilful or wanton injury.

9. Negligence 🔑32(2)

, One who patronizes a bank or shop in a hotel which has accommodations for a large patronage, with a theater, assembly rooms, shops, etc., abutting upon the corridors, has the same right in a corridor as one who comes to buy his luncheon or to occupy a room.

10. Negligence 🔑136(15)

Where a hotel is equipped with a theater, assembly rooms, shops, etc., abutting upon its corridors, whether one who enters on business with the hotel or a concessionaire and loiters in the lobby for five minutes or longer is a mere "licensee" is for the jury.

11. Negligence 🔑32(3)

Where hotel was equipped with assembly rooms, shops, etc., abutting upon its corridors, one who entered hotel for purpose of visiting bank, a concessionaire of the hotel, was not precluded from recovering for injuries sustained on the premises unless she was in the bank, or on a direct route thereto, but, her business with the bank having invited her to the hotel, and the adjacent corridors being open and the neighboring shops being accessible, she was entitled to conclude that she was invited to stroll in the corridors and to stand at another entrance prior to entering the bank.

12. Negligence 🔑136(15)

In action for injuries sustained in corridor of hotel by depositor of bank which was a concessionaire of the hotel and had an entrance opening from the hotel corridors, whether depositor, as an "invitee," by walking down corridor to another entrance to the hotel, before entering bank, for purpose of viewing arrival of a distinguished guest, and loitering there for five minutes, became a bare "licensee," was for the jury.

[Ed. Note.—For other definitions of "Invitee," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge

Action by Lillian Koppelman against the Ambassador Hotel Company of Los Angeles and another, for damages from injuries. Judgment for defendants, and plaintiff appeals.

Reversed and cause remanded.

Simon & Garbus, Abram Robert Simon, and Morton Garbus, all of Hollywood, for appellant.

Reginald I. Bauder, of Los Angeles, for respondent Ambassador Hotel Co. of Los Angeles, a California corporation.

Sidney A. Moss, of Los Angeles, for respondent Myers Bros., a corporation.

MOORE, Presiding Justice.

This action was for damages resulting from injuries suffered by plaintiff in a corridor of the Ambassador Hotel September 12, 1938. After the evidence was in, the defendants moved for an instructed verdict. The motion was granted and this appeal is from the judgment based thereon.

The plaintiff called at the hotel for the purpose of visiting defendant bank, a concessionaire of the hotel, in which she maintained an account and which she often visited. The bank had an entrance on the west side of the hotel building and a rear entrance opening from the north-south corridor which is entered through a double door also on the west side. Upon entering said double door, plaintiff observed groups of people in the hotel and upon inquiry learned that the aviator Corrigan, who had gained world-wide fame by reason of his recent trans-Atlantic flight, was expected momentarily at the hotel for luncheon. In order to witness the arrival of the famous aviator, plaintiff, instead of walking some thirty feet directly south to said rear entrance, followed the crowd along the corridor, in which she was accustomed to walk, to the north entrance where she waited about five minutes with the expectant throng "and then turned around and followed other people to go back to the other entrance where Corrigan's car would discharge him". While proceeding southerly along said north-south corridor, while still intending to visit the bank, "wedged right in and walking along" plaintiff tripped over a piece of timber on the floor three feet out from the wall and was injured. Said timber had been left there by workmen then engaged in making repairs upon the building.

The trial court determined that the plaintiff, after entering the hotel as an invitee, on hearing the music "changed her mind and went to the north door to see what was happening, stayed there some time during the parade, then started back and instead of going to the bank, either following her then intention, or making a new intention, went to the west entrance to see Corrigan arrive and after she had left the north door and started on the second errand not connected with the hotel or the bank in any way, that she received the injury of which she sues". Because of this understanding of the facts, the court gave the peremptory instruction.

The question to be decided is: Did plaintiff, while an invitee at said hotel and before completing her mission, by walking down the corridor to the north entrance for the purpose of viewing the arrival of a distinguished guest and loitering there for five minutes, become a bare licensee so clearly as to warrant the trial court in withdrawing the question from the jury?

[1-6] It is well settled that the owner or occupant of a building, who, expressly or impliedly, invites a person to come upon his premises is under a duty to exercise ordinary care to render the premises reasonably safe. Herzog v. Hemphill, 7 Cal.App. 116, 93 P. 899. The invitation to use the premises is inferred where there is a common interest or mutual advantage. Buckingham v. San Joaquin Cotton Oil Co., 128 Cal.App. 94, 16 P.2d 807. The keeper of a public place of business is bound to keep his premises and the passageways to and from it in a safe condition and to use ordinary care to avoid accidents or injury to those properly entering upon his premises on business. Corbett v. Spanos, 37 Cal.App. 200, 173 P. 769. But as to the rights of a licensee, it is the law that where a person goes upon the premises of another without invitation and simply as a bare licensee, and the owner of the property passively acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises, the owner is not liable for negligence for such person has taken all the risk upon himself. Means v. So. Calif. Railway Co., 144 Cal. 473, 77 P. 1001, 1 Ann.Cas. 206. Such proprietor assumes no duty to the one who is on his premises by permission only and as a mere licensee, except that while on the premises no wanton or wilful injury shall be inflicted upon him. Herzog v. Hemphill, supra. If it be shown that he stood in no contractual relationship with the own-

er or occupant and that he was there for purposes purely of his own, or of a third party, which had no relation whatever to the business of the owner or occupant and in which the latter had no interest, beneficial or otherwise, he is deemed in law to be a bare licensee. Buckingham v. San Joaquin Cotton Oil Co., supra.

[7, 8] Also, it is well settled that the same individual may, on the same premises and during practically the same period, occupy various legal relations toward the owner. One may have entered the premises upon invitation and during his stay he may become a licensee as to certain portions and a trespasser as to others. In each change of status, the rights and duties of the respective parties vary. An invitee who enters upon portions of the premises where he has no right to enter becomes a licensee and the only duty to him then is to refrain from wilful or wanton injury. Goldberger v. Market Street Ry. Co., 130 Cal.App. 597, 20 P.2d 351.

[9, 10] Looking to the facts of the instant case, the Ambassador Hotel is a nationally famous hostelry. It stands on attractive grounds upon one of the city's principal thoroughfares. It is a commodious building with accommodations for an enormous patronage, with a theater, assembly rooms, spacious lounges, popular dance hall, a "Cocoanut Grove", tiled corridors, smart shops with their display windows handsomely decorated, abutting upon said corridors. Such is the setting of said bank.

It is impliedly conceded that there was no obligation upon the plaintiff to enter the bank through its outside entrance. As invitee she might unquestionably enter said north-south corridor and walk along its west wall to the rear door of the bank. But, if instead of walking directly to said rear door, would she become a licensee if she walked down the center of the corridor to a point opposite the bank door? Would she lose her status as invitee if she crossed the corridor and walked southerly along its east wall to a point opposite the bank door to enter? If, while walking along the corridor from the point of her entrance to the bank door, she had stopped to speak with a friend, would she have lost her status as invitee while conversing with such friend for five or ten minutes? If she had made such an entry and spent said time with her friend, would it not be a question of fact for determination whether or not she lost her status as invitee during such conversation? If she could maintain her status as invitee while loitering for five minutes between the double door entrance and the bank entrance, would she lose such status if she walked northerly and easterly along the corridor to inspect the shop windows or to witness the arrival of a famous luncheon guest? One who patronizes a bank or shop in such a hotel has the same right in a corridor as one who comes to buy his luncheon or to occupy a room. The very presence and artistic maintenance of the corridors, the shops and the display windows in such hotel is an invitation not to be hasty in withdrawing from its premises when entering it as a guest or as an invitee on any other basis. Of course, if an invitee were to leave the point at which he had business and entered the basement or gone on a higher floor of the hotel for the purpose of secluding himself for his personal convenience and away from the mercantile areas of the hotel, we would have a different problem. But when he enters on business with the hotel, or its concessionaire, and loiters in the lobby for five minutes or longer, he keeps himself so closely to the business that brought him there that it would be error to decide, as a matter of law, that he was a mere licensee.

All authorities cited have been reviewed for the purpose of finding a distinct parallel. Those presented by defendants are readily distinguished. In each of them, the invitee had changed his status to that of bare licensee or trespasser by virtue of his entering portions of the premises where he had no express or implied invitation to go. Means v. Southern California Railway Co., supra; Kennedy v. Chase, 119 Cal. 637, 52 P. 33, 63 Am.St.Rep. 153; Medcraft v. Merchants' Exchange, 211 Cal. 404, 295 P. 822; Powers v. Raymond, 197 Cal. 126, 239 P. 1069; Herzog v. Hemphill, supra; Corbett v. Spanos, supra; Lindholm v. Northwestern Pacific R. R. Co., 79 Cal.App. 34, 248 P. 1033; State Compensation Insurance Fund v. Allen, 104 Cal.App. 400, 285 P. 1053; Buckingham v. San Joaquin Cotton Oil Co., supra; Goldberger v. Market St. Ry. Co., supra; Lawand v. California Products Co., 9 Cal. App.2d 147, 48 P.2d 979; Tharp v. Cotton Seed Oil Co., 27 Cal.App.2d 554, 81 P.2d 443, 82 P.2d 21.

Certain authorities clearly establish plaintiff's right to a jury's independent verdict. Hodge v. Weinstock, Lubin & Co., 109 Cal.App. 393, 293 P. 80; Brinkworth v. Sam Seelig Co., 51 Cal.App. 668, 197 P. 427; Harvey v. Machtig, 73 Cal.App. 667, 239 P. 78; Christy v. Ulrich, 113 Cal.App. 338, 298 P. 135; Stewart v. Lido Cafe, 13 Cal.App.2d 46, 56 P.2d 553, 555. In the case of Stewart v. Lido Cafe, supra, Stewart after being directed "down the end of the hall to the left" to the lavatory, entered the second room to the rear and proceeded to the east or right side of said room in the dark and then again to the right to enter a dark stairway where he fell. The jury was allowed to determine whether he was an invitee on the stairway where he fell and its verdict was approved. "The invitation also extends", said the court, "to those portions of the premises where the invitee under the circumstances and conditions of his invitation would naturally be likely to go [citing Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L.R.A. 580; Bush v. Weed Lumber Co., 63 Cal.App. 426, 218 P. 618]. Such an invitation may be manifested by the arrangement of the premises as well as the conduct of the proprietor."

In the case of Schmidt v. Bauer, supra, while plaintiff was denied damages because he entered private places contrary to his invitation, yet the court held that the keeper of a public place of business is bound to keep his premises and the passageway to and from it in safe condition and to use ordinary care to avoid accidents to those properly entering his premises on business.

In the case of Chafor v. Long Beach, 174 Cal. 478, 163 P. 670, 671, L.R.A.1917E, 685, Ann.Cas.1918D, 106, where the public was invited to a municipal auditorium, it was held that "she was at least a licensee by permission or invitation, and * * * the city * * * is responsible for the exercise of ordinary care to see that such a licensee is not injured," and a verdict for her death was affirmed.

In the case of Harvey v. Machtig, supra, the plaintiff was the mother of one of the concessionaires, George Harvey, at the resort operated by the defendant. George had made reservations for luncheon in the dining room of the resort, and, while unloading his supplies at his own concession, left his mother sitting in his automobile on a roadway of defendant leading from the public highway to the resort, under an old tree in which was a large platform constructed of logs. While so waiting, the tree with its said platform fell upon the plaintiff and caused her injuries. A verdict in her favor was upheld. "There was a duty imposed upon respondent", said the court, "to use ordinary care to keep its grounds, including the thoroughfares, in a safe condition for its invitees". [73 Cal.App. 667, 239 P. 81.] The roadway where the injury occurred was admittedly open to the public and maintained to facilitate ingress and egress.

[11, 12] In the instant case, it was not essential to plaintiff's recovery that she be in the bank or on the direct route from the double door entrance to the bank's door. Her business with the bank having invited her to the hotel, the adjacent corridors being open and the neighboring shops being accessible, it was reasonable for plaintiff to conclude that she was invited to stroll in the corridors and to stand at the north entrance prior to entering the bank. (Restatement of the Law of Torts, vol. 2, sec. 343.)

Because of the views herein expressed, the judgment is reversed and the cause remanded for further proceedings.

We concur: WOOD, J.; McCOMB, J.

14 Cal.2d 647

NEBELUNG et al. v. NORMAN et al.

S. F. 16266.

Supreme Court of California.

Nov. 27, 1939.

1. Negligence 🔑134(4)

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated after automobile had been driven about 60 miles with the retreaded tire thereon and while automobile was traveling about 60 miles an hour causing driver to lose control of automobile, evidence sustained finding that manufacturer was negligent in the manufacture of the retreaded tire.

2. Negligence 🔑134(11)

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated after automobile had been driven about 60 miles with the retreaded tire thereon and while automobile was traveling about 60 miles an hour causing driver to lose control of automobile, evidence sustained finding that manufacturer's negligence in manufacture of the retreaded tire was proximate cause of the accident.

3. Negligence 🔑135

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated causing driver to lose control of automobile, evidence sustained finding that operation of automobile at approximately 60 miles per hour was not contributory negligence.

4. Appeal and error 🔑1008(1)

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated causing driver to lose control of automobile, whether occupants were guilty of negligence by reason of speed of automobile was for trier of facts, and findings of trial court sitting without jury could not be set aside.

5. Evidence 🔑5(2)
Negligence 🔑24

It is common knowledge that automobiles are operated at times at a speed of approximately 60 miles an hour, and manufacturers of automobile tires must reasonably anticipate that automobiles will be driven at times at such speed.

6. Negligence 🔑142

Contention that finding that each plaintiff was free from negligence which contributed to happening of accident was in irreconcilable conflict with finding that it was not true that plaintiffs, or any of them, were guilty of contributory negligence as alleged was hypertechnical.

7. Negligence 🔑142

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated causing driver to lose control of automobile, where trial court found that manufacturer had sold retreaded tire without any express warranty, and further found that manufacturer represented that tire was safe and warranted tire to be free from defects and capable of withstanding use for which it was designed, the findings were not in irreconcilable conflict.

8. Appeal and error 🔑1071(5)

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated causing driver to lose control of automobile, where judgment rendered against manufacturer was based on negligence and was supported by material findings without resort to findings regarding any warranty, findings regarding warranty were immaterial.

9. Negligence 🔑142

In action against corporation and individual for negligence, finding that allegations of particular paragraph, charging that "defendants" did certain acts, were true, was not in irreconcilable conflict with finding that individual defendant was not the corporation's agent, where the adoption of the plural was inadvertent and trial court manifestly intended to refer only to the defendant corporation.

10. Negligence 🔑27

In automobile occupants' action against manufacturer of retreaded tire purchased from a dealer for injuries sustained when retreaded tire disintegrated causing driver to lose control of automobile, the nature of the article sold brought case within recognized exceptions to general rules which ordinarily shield manufacturer from liability to persons as to whom there exists no contractual privity with the manufacturer.

11. New trial ⚿100

Where evidence showed that plaintiff had suffered fracture of second and third lumbar vertebræ resulting in curvature of spine and muscle spasm and that proper treatment would restore plaintiff within a few months to a condition which would permit many normal activities, but not that of strenuous heavy lifting, denial of motion for new trial based on alleged newly discovered evidence relating to extent of injuries suffered by plaintiff accompanied by affidavits and motion pictures showing activities engaged in by plaintiff was not error.

12. New trial ⚿150(2)

When a new trial is asked on ground of newly discovered evidence, the moving party must make a strong case, especially when alleged newly discovered evidence relates to facts occurring after conclusion of trial.

13. Appeal and error ⚿1072

Where motion to strike counteraffidavits submitted in opposition to motion for new trial was granted in part, denial of such motion in part was not prejudicial error, though affidavits may have contained other hearsay statements which were not stricken.

14. Appeal and error ⚿891

Where order denying motion for new trial on ground of newly discovered evidence was affirmed, because affidavits and motion pictures offered in support of the motion merely showed recreational activities by plaintiff after trial, whereas award of damages was based on showing that injury was serious and permanent but did not cause total disability, reviewing court denied motion to show moving pictures of plaintiff's activities after trial.

HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; Raymond McIntosh, Judge.

Personal injury action by Edward Nebelung, Jr., and others against A. G. Norman, the Laher Spring & Tire Corporation, and others. From a judgment for plaintiffs against the last-named defendant, such defendant appeals.

Affirmed.

For prior opinion, see 89 P.2d 713.

Frank V. Campbell, Walter E. Rankin, and Robert E. Hayes, all of San Jose, for appellant.

Bohnett, Hill, Cottrell & Boccardo and James F. Boccardo, all of San Jose, for respondents.

PER CURIAM.

After further consideration of this cause, we find ourselves in accord with the opinion of the District Court of Appeal as prepared by Mr. Justice Spence of the First District, Division Two, and we hereby adopt the same as the opinion of this court. It is as follows:

"The three plaintiffs brought this action seeking to recover damages for personal injuries sustained by them in an automobile accident. The cause was tried by the court sitting without a jury and a judgment was entered in favor of plaintiffs and against defendant, Laher Spring & Tire Corporation. By said judgment, plaintiffs Nebelung and Mucia were awarded the sum of $500 each, while plaintiff Virnig was awarded the sum of $7,500. Said defendant's motion for new trial was not ruled upon within the time prescribed and was therefore denied by operation of law. Said defendant appeals from the judgment.

"The defendant Laher Spring & Tire Corporation, hereinafter referred to as the defendant, was in the business of buying used automobile tires, removing the old tread and replacing it with new, and selling said tires as 'retreads' or 'remolds'. In 1936, they sold some retreads to a dealer named Gilbert, who, in turn, sold one of said retreads to plaintiff Nebelung. Shortly thereafter said plaintiff placed said retread on the right rear wheel of his automobile and, after traveling about 60 miles thereon, said tire disintegrated while the car was being driven with the three plaintiffs riding therein. The new tread became completely detached from the casing or carcass of the tire, causing the car to swerve out of control and to run off the highway with the resulting injuries to plaintiffs.

"It is conceded by defendant that defendant manufactured the tire involved and that there is substantial evidence to show that said tire came out of the mold with a defect known as a 'mold-pinch' or 'buckle'. This caused an indentation on the inner side of the tire for about one-third of its circumference, which indentation was filled by defendant with rubber cement. While defendant lays some stress upon the fact that said tire was sold to Gilbert as a 'second' rather than as a 'first', it appears from the evidence of defendant's own witnesses that the designation 'second' merely denotes with the trade some minor irregularity such as an irregularity of the knobs of the tread. One of defendant's witnesses gave the following answers to the questions propounded:

"'Q. And the only difference between a first and a second is the looks of the tread? A. Yes.

"'Q. The real qualities are the same, the wearing quality? A. Yes, they test along the same as the others.

"'Q. Your firsts and seconds as far as the tread sticking to the carcass is concerned should be the same? A. Yes.

"'Q. And you wouldn't expect the tread on a second to come off any sooner than you would a first? A. Absolutely not.'

"We may therefore treat the fact that the tire was sold as a second as wholly immaterial in this discussion.

"The casing and tread were introduced in evidence as well as photographs of both. Experts were called by both parties to give their opinions with respect thereto. Said evidence was ample to show that defendant was chargeable with negligence in several respects in the manufacture of the retread tire in question. We need only point to the evidence showing that defendant had failed to remove the breaker strips from the tire before applying the new tread and had failed to take proper precautions to avoid the mold-pinch in applying the new tread. It appears that the failure of defendant in the foregoing respects prevented proper adhesion between the new tread and the casing and that experiments had shown that such defects invariably cause a new tread to loosen and to separate from the casing when the tire is put in service. We do not understand that defendant's experts seriously questioned the existence of said defects or the fact that it is extremely dangerous to use a retread tire containing such defects. It was conceded by one of defendant's experts that a tire with a mold-pinch could not be as good a tire as one without a mold-pinch and that he would not want one of his customers using a tire with a mold-pinch without knowing it. Another of defendant's experts admitted that he 'never saw a tread come off like that'; that there was something unusual about it and that (referring to the casing and retread in evidence) 'it is the derndest looking mess I have ever seen in my life for ordinary wear'. When asked if there was not something wrong with the workmanship, he merely said, 'Well, it wasn't done intentionally, I'm sure of that.' Some of defendant's experts gave their opinions that the tire had been used in an underinflated condition, but the evidence on that subject, other than said opinions, was to the contrary.

[1] "It was plaintiffs' claim upon the trial that an automobile tire is an article which, if negligently manufactured, becomes imminently dangerous to life and limb in the use for which a tire is intended; that the defendant was guilty of negligence in retreading the tire in question and selling it for such use; and that as a direct and proximate result of such negligence, and without negligence on the part of plaintiffs or any of them, the tire in question disintegrated when put to such use thereby overturning the automobile in which they were riding and causing their injuries. There was ample evidence to sustain plaintiff's claims and the trial court made findings in accordance therewith.

[2-5] "Defendant makes the claim that some of the findings are not sustained by the evidence, but we are of the opinion that all of the material findings are sustained. Defendant claims that the findings on the issue of proximate cause were based on speculation and conjecture and not upon any fair inference. This claim cannot be sustained. While experts were not in accord as to the immediate cause of the disintegration of the defective tire, this would appear to be immaterial. Plaintiffs presented ample evidence to show that defendant was negligent in manufacturing the defective tire and placing it on the market and the only fair inference to be drawn from said evidence is that defendant's negligence was the proximate cause of the accident. In this connection, defendant claims that 'the wrong of Gilbert and the high speed at which the car was traveling intervened assumed negligence' on the part of defendant. The 'wrong of Gilbert' consisted in buying the tire from defendant as a second and in selling it to plaintiff Nebelung as a first, but under the testimony of defendant's own witnesses, a second was as safe for use as a first. The 'high speed' at which the car was traveling was approximately sixty miles

per hour. This brings us to the further claim of defendant that driving at such speed constituted negligence on the part of plaintiffs and that the findings negativing contributory negligence were contrary to the evidence. This claim appears equally untenable as it cannot be said that the evidence showed that plaintiffs were guilty of contributory negligence as a matter of law. The automobile was being driven along a surfaced highway which was eighteen feet wide with four foot shoulders. The accident happened in open, desert country at a time when no other traffic was in the vicinity. In fact, it was fifteen minutes or more after the accident happened before any other vehicle arrived upon the scene. The question of whether plaintiffs were guilty of negligence by reason of the speed of the car was one for the trier of the facts and the trial court's findings may not be set aside under the circumstances. With respect to the question of speed, it is a matter of common knowledge that automobiles are operated at times at a speed of approximately sixty miles per hour. Such speed is not unlawful under all circumstances and manufacturers of automobiles and automobile tires must reasonably anticipate that automobiles will be driven at times at such speed. We therefore conclude that defendant may not take shelter behind either the alleged 'wrong of Gilbert' or the 'high speed' at which the car was being driven.

[6-9] "Defendant further contends that certain findings are in irreconcilable conflict. We find no conflict in any of the material findings. The claim that the finding 'that each plaintiff was free from negligence which contributed to the happening of the accident' is in irreconcilable conflict with the finding 'that it is not true that plaintiffs, or any of them, were guilty of contributory negligence as alleged' is hypertechnical. The remaining alleged conflicts arise out of the situation presented by the pleadings and proof. Plaintiffs pleaded in their complaint that Gilbert was an agent of the defendant and that defendants made certain express warranties to plaintiff Nebelung with respect to the tire. They also pleaded negligence. The evidence developed that Gilbert was not an agent of defendant and that defendant had made no express warranty to either Gilbert or plaintiff Nebelung concerning the tire. The trial court found that defendant had sold the tire 'without any express warranty'. It further found that defendant 'represented that the tire was in all respects safe for use in the manner for which it was manufactured and sold' and 'warranted and held out said tire to be free from defects and capable of withstanding use for which it was designed * * *'. We find no irreconcilable conflict in said last-mentioned findings, but furthermore, the issues upon which said findings were based have now become immaterial issues. When plaintiffs ascertained that Gilbert was not an agent of defendant, they predicated their claim solely upon the alleged negligence of defendant and the judgment based upon such negligence finds support in the material findings without resort to the findings relating to any warranty, either express or implied. Defendant further lays stress on a finding which referred to a paragraph of the complaint and found the allegations thereof to be true. Said paragraph of the complaint used the word 'defendants' and charged that defendants did certain acts. In other findings, the trial court found that defendant Gilbert was not the agent of the defendant company. We believe, however, that it is entirely clear that the reference to the paragraph of the complaint wherein the word 'defendants' was employed was an inadvertence in so far as the adoption of the plural was concerned and that the trial court intended to refer only to the defendant company in said finding. We therefore believe that said findings may be reconciled and obviously should be reconciled as above indicated.

[10] "Before proceeding further we should state that we are of the opinion that the nature of the article here sold brings the cause within the recognized exceptions to the general rules which ordinarily shield the manufacturer from liability to persons as to whom there exists no contractual privity with the manufacturer. The general subject is discussed at length in Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481, and such discussion need not be repeated here. It is sufficient to state that the trend of judicial decisions is to extend the exceptions beyond articles which are inherently dangerous and to include all articles which are reasonably certain to place life and limb in peril if negligently manufactured. Several examples of such articles, including automobiles, are referred to in the cited case and we believe that an automo-

bile tire is such an article. We may further state that we do not believe the case of Stultz v. Benson Lumber Co., 6 Cal. 2d 688, 59 P.2d 100, to be controlling as that case involved the manufacture and sale of lumber in which the defects were apparent.

[11] "Defendant also contends that 'the judgment should be reversed at least in so far as it affects appellant's liability to plaintiff Virnig because the trial court did not grant the appellant tire company's motion for new trial'. Our examination of the record leads us to the conclusion that this contention is likewise without merit. Defendant's motion was based upon alleged newly discovered evidence relating to the extent of the injuries suffered by plaintiff Virnig. It was accompanied by affidavits and motion pictures showing activities engaged in by said plaintff after the trial.

"The testimony on the trial showed that said plaintiff, a man 26 years of age, has suffered a fracture of the second and third lumbar vertebrae resulting in curvature of the spine and muscle spasm; that he stood and walked in an unnatural position; that the condition would be permanent but would be helped by a brace; that with proper bracing, the muscles should strengthen within a few months and the pain would then be negligible 'except if he was exerting himself strenuously under heavy lifting'. While the doctors testified that the condition would be permanent, the testimony did not indicate that said plaintiff would be permanently prevented from engaging in all work and physical activity. On the contrary, it indicated that proper treatment would restore said plaintiff within a few months to a condition which would permit many normal activities, but not that of strenuous, heavy lifting. In short, the testimony showed a serious and permanent injury to said plaintiff but did not show a total and permanent disability. The award of $7,500 indicates that this was the view taken by the trial court.

"The accident occurred in October, 1936, the trial was had in June, 1937, and the judgment was entered in October, 1937. It appears that said plaintiff has been examined prior to the trial by a doctor selected by defendant but that said doctor was not called at the trial. The activities stressed in defendant's affidavits were recreational activities and work attempted by said plaintiff several months after the trial. It is conceded that the counteraffidavits 'deny everything' except that said plaintiff engaged in these activities and as a result he 'experienced pain and discomfort in his back'.

[12] "Taking into consideration the testimony given at the trial, the amount of the verdict and the showing made on the motion for new trial, we cannot say that the trial court erred in failing to grant said motion. When a new trial is asked upon the ground of newly discovered evidence, 'the moving party must make a strong case' (Smith v. Schwartz, 14 Cal. App.2d 160, 166, 57 P.2d 1386), and this is particularly true when the alleged newly discovered evidence relates to facts occurring after the conclusion of the trial. The only California case, involving comparable facts, which has been called to our attention is Lawrence v. Pickwick Stages, Northern Division, 68 Cal.App. 494, 229 P. 885. It was there held that the motion for new trial had been properly denied. Upon the showing made here, we cannot say that the trial court abused its discretion in failing to grant said motion and in permitting the statutory time to expire.

[13] "The last contention of defendant is that the trial court committed prejudicial error in denying in part its motion to strike said plaintiff's counteraffidavits submitted in opposition to the motion for new trial. Said motion was granted in part and while said affidavits may have contained other hearsay statements which were not stricken, we cannot say that the ruling of the trial court constituted prejudicial error."

[14] Appellant's motion to show moving pictures of activities of respondent, Virnig, subsequent to the trial, is denied.

Respondents' motion to produce additional evidence in this case is hereby denied.

The judgment is affirmed.

I dissent: HOUSER, J.

14 Cal.2d 666

SHEA et al. v. LEONIS et al.

L. A. 17079.

Supreme Court of California.

Nov. 30, 1939.

1. Corporations 🔑**1**
Landlord and tenant 🔑**208(4)**

If a corporation was organized for sole purpose of taking an assignment of a lease and was without other assets, the separate corporate existence of the corporation would be disregarded and its liability as the last assignee of lease would be treated as the liability of persons who were beneficial owners of its corporate stock.

2. Corporations 🔑**1**
Landlord and tenant 🔑**208(4)**

Stockholders of a corporate assignee of a lease, while enjoying benefits of lease, cannot equitably claim that they may escape burdens through device of taking an assignment of the lease in the name of a corporation which is without other assets and has been organized by them for purpose of taking the assignment.

3. Corporations 🔑**1**

Corporate separate existence will be disregarded where to recognize it would be to sanction a fraud or promote injustice.

4. Fraudulent conveyances 🔑**41**

A debtor cannot evade payment of his debts by forming a corporation which does not assume the debt and thereafter transferring all his assets to it.

5. Corporations 🔑**1**

Liability cannot be avoided by taking an obligation, such as a lease, in the name of a specially organized corporation which has no other assets.

6. Corporations 🔑**378**
Landlord and tenant 🔑**208(4)**

Where stock of corporate assignee of lease was held for corporate assignor and assignee was organized for purpose of terminating liability of assignor for obligations under lease, assignment was ineffectual to relieve assignor of liability for rent accruing subsequent to purported assignment.

7. Landlord and tenant 🔑**208(4)**

An assignee of lease cannot escape liability by an assignment which is merely colorable.

8. Limitation of actions 🔑**24(2)**

An action by lessors against corporate assignee of lease, its stockholders, and subsequent corporate assignee, dominated by same stockholders, which was organized for sole purpose of taking assignment in order to defeat collection of rent, to recover rent accruing under lease within four years of action brought was upon the written contract of lease, and hence was not barred by limitations.

9. Landlord and tenant 🔑**230(1)**

In lessors' action for rent complaint alleging facts showing the virtual identity of corporate assignee of lease, its stockholders, and another corporation organized by it for sole purpose of taking assignment of lease in order to defeat collection of rents was not demurrable.

10. Landlord and tenant 🔑**230(1)**

In lessors' action to recover rent from corporate assignee of lease, its stockholders, and a subsequent corporate assignee, dominated by the same stockholders, which was organized for purpose of taking assignment in order to defeat collection of rents, a count against a person claimed to hold stock in subsequent assignee did not state a cause of action where it was not alleged in such count that stockholder had a beneficial interest in the stock, so as to impose liability on theory of disregard of corporate identity.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Lusannah C. Shea, Willard W. Shea and Willard W. Shea, as administrator of the estate of John G. Shea, deceased, against J. B. Leonis, Sr., and others to recover rentals and other items claimed to be due plaintiffs under terms of a lease. From an unsatisfactory judgment, plaintiffs appeal. On rehearing.

Reversed in part and affirmed in part.

For prior opinion, see 92 P.2d 400.

Chapman & Chapman, of Los Angeles, and De Coto & St. Sure, of Oakland, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (S. M. Haskins, Frederic H. Sturdy, and Ira C. Powers, all of Los Angeles, of counsel), for respondents.

Young, Lillick, Olson & Kelly, Young & Kelly, Edward R. Young, and Frank R.

Johnston, all of Los Angeles, for J. B. Leonis, Sr., and J. B. Leonis, Jr.

PER CURIAM.

A rehearing was ordered herein in order to give further consideration to the contentions of the defendants. A reexamination of the questions raised on the appeal has confirmed the conclusions reached in the former opinion. We therefore adopt as the opinion of this court on rehearing the opinion prepared by the late Justice SEAWELL and previously filed, as follows:

"This is an action to recover accrued rent in the sum of $16,833.33, with interest, and also taxes and assessments in the amount of $5,435, which the lessee agreed by the lease to pay. Plaintiffs appeal from the judgment entered for defendants upon counts one, two, four and five of the complaint after the sustaining of defendants' general and special demurrers to said counts.

"Defendant J. B. Leonis, Inc., assignee of a ninety-nine year lease, transferred said lease to defendant Boyle Avenue Investment Company. The rent herein sued for accrued subsequent to this transfer. The court below held good count three of the complaint, which states a cause of action against Boyle Avenue Investment Company as last assignee of the lease. The court also held good count six as against J. B. Leonis, Inc. Said count alleged that by the terms of the lease an assignment thereof did not operate to release the assignor from liability on the lease if at the time of the assignment it was in default as to any terms of the lease. It averred that J. B. Leonis, Inc., was in default upon the covenants of the lease on December 21, 1931, when it assigned said lease to Boyle Avenue Investment Company.

"It appears from the counts involved on this appeal that defendants J. B. Leonis, Sr., and J. B. Leonis, Jr., own all stock of J. B. Leonis, Inc., which is described as a 'financially responsible company'. The stock of Boyle Avenue Investment Company stands in the names of J. B. Leonis, Jr., and Adelina F. Leonis, his wife. The theory of plaintiffs is that defendant Boyle Avenue Investment Company is but the alter ego of its stockholders, and that it was organized for the sole purpose of taking an assignment of the lease and is without other assets, with the result, plaintiffs contend, that the separate corporate identity of said company should be disregarded and its stockholders held for the rent herein sued for.

"It is alleged in count 1 that the stock of Boyle Avenue Investment Company, in the names of J. B. Leonis, Jr., and Adelina F. Leonis, is held for J. B. Leonis, Sr., and J. B. Leonis, Jr., against whom judgment is prayed for in this count. In count 2 it is alleged that the stock is held for J. B. Leonis, Inc.; in count 4, that J. B. Leonis, Jr., and Adelina F. Leonis are themselves the beneficial owners; and in count 5, that it is held for J. B. Leonis, Sr., J. B. Leonis, Jr., and J. B. Leonis, Inc. Each count prays for judgment against the parties, respectively, for whom the stock of Boyle Avenue Investment Company is alleged to be held.

[1, 2] "We entertain no doubt that if Boyle Avenue Investment Company was organized as above outlined its separate corporate existence should be disregarded and its liability as last assignee of the lease held to be the liability of the persons who are the beneficial owners of all its corporate stock. Defendants point to cases which hold that if the lessor does not restrict assignment to solvent transferees, an assignment may lawfully be made to an insolvent. Johnson v. Sherman, 15 Cal. 287, 76 Am. Dec. 481; Lindley v. Sale, 140 Cal.App. 662, 668, 36 P.2d 130. These cases are not controlling in the circumstances set out in the complaint. The stockholders of the corporation assignee, Boyle Avenue Investment Company, while enjoying the benefits of the lease, cannot equitably claim that they may escape its burdens through the device of taking the assignment of lease in the name of a corporation which is without other assets and has been organized by them for the purpose of taking such an assignment.

[3-5] "Corporate separate existence will be disregarded where to recognize it would be to sanction a fraud or promote injustice. Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641. For example, a debtor may not evade payment of his debts by forming a corporation which does not assume the debt and thereafter transferring all his assets to it. Higgins v. California Petroleum & Asphalt Co., 122 Cal. 373, 55 P. 155; Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780; Grotheer v. Meyer Rosenberg, Inc., 11 Cal.App.2d 268, 53 P.2d 996; Sunset Farms, Inc., v. Superior Court, 9 Cal.App.2d 389, 50 P.2d 106. The equitable principle underlying these de-

cisions is equally applicable where, as in the instant case, the device adopted is not a transfer of assets, but an attempt to avoid liability for benefits enjoyed by means of taking the obligation in the name of a specially organized corporation which has no other assets.

[6, 7] "As to the count which avers that the stock of the newly organized Boyle Avenue Investment Company is held for J. B. Leonis, Inc., the corporation assignor, and that the new company was organized for the purpose of terminating liability of the assignor, it may be said in addition that the assignment is, in effect, as plaintiffs allege, no assignment at all and that the new corporation is but the old one under another name. An assignee cannot escape liability by an assignment which is merely colorable. 1 Tiffany, Real Property, 2d Ed., 184; 16 R.C.L. 866.

[8] "An action against defendants for rent accruing under the lease within four years of action brought is upon the written contract of lease, Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780, and hence would not be barred by the statute of limitations.

[9, 10] "We conclude that the several counts state a cause of action against the parties which they, respectively, seek to hold, with the exception that count five states no cause of action against Adelina F. Leonis, but only as to defendants J. B. Leonis, Sr., and J. B. Leonis, Jr., and J. B. Leonis, Inc. Count four, based on the theory that J. B. Leonis, Jr. and Adelina F. Leonis are beneficial owners of the stock of Boyle Avenue Investment Company, properly includes Adelina F. Leonis as a party against whom recovery is sought, but it is not averred in count five that she has any beneficial interest in said stock, with the result that in said count five liability against her on the theory of disregard of the corporate identity is not made out.

"The defendants also filed special demurrers urging uncertainty and ambiguity in several particulars. We are of the view that the complaint is not subject to special demurrer in any of the particulars relied on."

The judgment for defendants entered upon demurrer is reversed except as to the judgment for Adelina F. Leonis on the fifth count of the complaint, which is affirmed, appellants to recover costs.

---

14 Cal.2d 656

WILLIAMS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 17263.

Supreme Court of California.

Nov. 28, 1939.

1. Courts 🔑50

Under Constitution providing for superior court in each county and that there may be as many sessions of court at the same time as there are judges elected, appointed or assigned thereto, etc., jurisdiction is vested in the court and not in any particular judge or department thereof and whether sitting separately or together the judges hold but one and the same court. Const. art. 6, § 6.

2. Courts 🔑481

Where a proceeding has been assigned for hearing and determination to one department of the superior court by the presiding judge of the court in conformity with the rules thereof and the proceeding has not been finally disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. Code Civ.Proc. § 67a; Rules of the Superior Court, rule 15, § 4; Const. art. 6, § 6.

3. Courts 🔑50

While one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts. Const. art. 6, § 6.

4. Courts 🔑481

Where contempt proceeding arising out of reporter's failure to comply with order to proceed with preparation of transcript according to agreement with appellant, was pending in order to show cause department of superior court, another department of the same court was without jurisdiction to set aside the order directing reporter to prepare the transcript on ground that agreement to prepare transcript provided for contingent compensation and was void as against public policy. Code Civ.Proc. § 67a; Rules of the Superior Court, rule 15, § 4; Const. art. 6, § 6.

5. Courts 🔑481

The judge presiding in one department of superior court has the power to make and enforce all orders necessary for the disposition of the proceeding that has been assigned to his department, and no judge sitting in any other department can interfere with him in the exercise of such power. Code Civ.Proc. § 67a; Const. art. 6, § 6.

6. Courts 🔑481

Where contempt proceeding arising out of reporter's failure to comply with order to proceed with preparation of transcript according to agreement with appellant was pending in order to show cause department of superior court, department of same court which tried cause on the merits was without jurisdiction to set aside the order directing the reporter to proceed with preparation of the transcript where rule of the court conferred upon presiding judge of the superior court full power of assignment. Rules of the Superior Court, rule 15, § 4; Code Civ.Proc. § 67a.

7. Courts 🔑50

If one department of the superior court exercises authority in a matter which might properly be heard in another, the action constitutes at most an irregularity and does not affect the jurisdiction. Code Civ.Proc., § 67a; Rules of the Superior Court, rule 15, § 4.

8. Courts 🔑481

Where contempt proceeding arising out of reporter's failure to comply with order to proceed with preparation of transcript according to agreement with an appellant was pending in order to show cause department of superior court, department which heard the cause on the merits was without jurisdiction to declare the agreement between the reporter and the appellant as contrary to public policy, since such adjudication could be made only through the medium of an action brought for that purpose after the reporter delivered transcript. Code Civ. Proc. §§ 953a, 953b.

9. Certiorari 🔑5(1)

An order vacating a previous order directing court reporter to proceed with preparation of transcript pursuant to agreement with appellant, declaring such agreement void and requiring reporter to prepare transcript upon consummation of satisfactory new agreement, was not appealable as a "special order made after final judgment" and hence was reviewable by certiorari. Code Civ.Proc. § 963.

[Ed. Note.—For other definitions of "Special Order," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County.

Certiorari proceeding by Edna I. Williams against the Superior Court of the State of California, in and for the County of Los Angeles, and all of the judges thereof to annul an order vacating a previous order of another judge. A certified copy of the proceedings had in both departments of the superior court was filed and a demurrer to the petition for the writ was filed.

Demurrer overruled and order annulled.

Prior opinion, 91 P.2d 152.

Delvy T. Walton and B. R. Ware, both of Los Angeles, for petitioner.

J. H. O'Connor, County Counsel, and Douglas De Coster, Asst. County Counsel, both of Los Angeles, for respondent Superior Court.

KNIGHT, Justice pro tem.

An order was made by the judge of department 34 of the superior court of Los Angeles county citing Samuel Rappaport, one of the official stenographic reporters of the superior court of that county, to appear before said department on March 6, 1939, then and there to show cause why he should not be adjudged guilty of contempt for failing to comply with a previous order made by the judge of said department on January 4, 1939, directing said reporter to proceed immediately with the preparation of a reporter's transcript in accordance with the written agreement theretofore made by him with the petitioner herein, Edna I. Williams, under the authority of section 953b of the Code of Civil Procedure. But pending the hearing of the contempt matter and on February 28, 1939, the judge of another department of said superior court, number 12, made an order which, among other things, purported to declare void for want of jurisdiction the order made by the judge of department 34 upon which the citation for contempt was based. Thereupon petitioner instituted this proceeding in certiorari in the District Court of Appeal of the Second District, for the purpose of having reviewed and annulled the order so made on February 28, 1939, by the judge of department 12. In response to the writ that was issued there was filed in said District Court of Appeal a demurrer to the petition for the writ and a certified copy of the proceedings had in both departments of said superior court pertaining to the making of the two orders above mentioned; and following a hearing the District Court of Appeal rendered its decision annulling the order so made by the judge of department 12. Thereafter on respondents' application the cause was transferred to this court for hearing and determination.

The proceedings leading up to the making of the order under review, as they are shown by the record, and out of which the jurisdictional questions arise, are these: Petitioner took an appeal pursuant to the alternative method provided by section 953a of the Code of Civil Procedure from an adverse judgment entered after trial on the merits in an action brought by her in the superior court of Los Angeles county. The action was tried in department 12 and consumed 59 court days. Three stenographic reporters officiated, one of whom was Rappaport and his services covered all but seven of the 59 days. Section 953b of the Code of Civil Procedure provides that at the time an appellant files a request for the preparation of a transcript on appeal as required by the preceding section he shall file also an undertaking in an amount to be fixed by the clerk of the court to insure the payment of the costs of the transcript, or he "may arrange personally with the stenographic reporter for his compensation". Petitioner made such an arrangement with each of said reporters and thereupon they joined in filing a waiver of the giving of the undertaking provided for in said section 953b. Two of the reporters, Cree and Hanna, carried out the arrangements made with them. In due time they prepared and delivered those portions of the transcript for which they were accountable, and petitioner paid them approximately $363 in full for their services. The arrangement made with Rappaport was confirmed by a written agreement dated April 19, 1938, which he himself prepared. It was signed by him and petitioner, and sets forth specifically the terms under which he agreed to prepare and deliver, and was to be paid for said transcript. On April 29, 1938, and again on June 4, 1938, he prepared written modifications of the agreement which likewise were signed by both parties; and each modification contained a concluding clause to the effect that except as therein stated the original agreement remained in full force and effect. By the terms of said agreement Rappaport agreed to furnish petitioner with the original and one copy of the reporter's transcript "upon a contingent basis", the substance of which was that petitioner would pay for the transcript at the statutory rate if she was successful in her appeal or recovered from the defendant either by judgment or compromise, but in any event, that she would reimburse Rappaport from time to time as the work progressed for the cost of the supplies required to prepare the record. Admittedly petitioner complied with her part of the agreement. During the eight months following the making thereof she paid Rappaport approximately $510, of which amount $310 had been used to defray the expenses of the copying of the exhibits and for the purchase of supplies; but during said eight months' period he had transcribed less than seven of the fifty odd days of the court proceedings he had reported, so that at the end of that time there remained in his possession, $120 for which he had rendered no service. Petitioner made repeated demands upon him to complete the transcript, but his excuse for the delay was that he was engaged in other reportorial duties; meanwhile the time to file the transcript had been extended by stipulation and court order, the last extension granted being on October 7, 1938, which extended the time to February 28, 1939. In November, 1938, petitioner became apprehensive that the transcript would not be completed within the allotted time; whereupon by way of application for an order to show cause supported by affidavit she brought the matter to the attention of the presiding judge of said superior court. By virtue of the provisions of section 67a of the Code of Civil Procedure, the presiding judge of the superior court of Los Angeles county is authorized to "distribute the business of the court among the judges thereof, and prescribe the order of business and perform such other duties as the judges of the said court may by rule provide"; and section 4 of rule 15 of the rules of said court provides that all orders to show cause shall unless otherwise ordered by the presiding judge be heard in the order to show cause department. Acting under the authority thus conferred upon him the presiding judge after first having referred the matter for investigation to a committee of judges of said court known as the "reporter's committee", directed that the application for the order to show cause be presented to the judge of the order to show cause department; and this was done. Department 34 was the order to show cause department; and on December 23, 1938, the judge thereof issued an order directing Rappaport to show cause therein on January 4, 1939, why he should not be compelled to proceed with the preparation of the record in accordance with said agreement; also why he should not be suspended from his duties as an official reporter of the court until the record was completed. The reporter was present at the hearing on the date set, the agreement between the parties was produced and received in evidence, and in connection therewith it was shown that he still retained $120 of the total amount paid for which he had furnished no part of the transcript. Rappaport made no counter showing, nor did he object to the matter being heard before that department; whereupon an order was made directing him to proceed immediately with the preparation of the transcript in accordance with the written agreement theretofore made by him. On February 24, 1939, the judge of said department heard and denied an application made by Rappaport to have said order vacated; and on February 27, 1939, the order was made by said judge directing Rappaport to appear therein on March 6, 1939, and show cause why he should not be adjudged guilty of contempt for failure to comply with its previous order. But on that same day, February 27, 1939, Rappaport applied to and obtained from the judge of department 12 an order shortening time to present a motion therein on the following day at 2 o'clock. The purpose of the motion was, as stated in the notice thereof, to obtain an order extending the time to file the transcript, but there was served therewith a copy of a petition addressed to the court and a letter written to petitioner by counsel for Rappaport, wherein it was stated that Rappaport had been advised that the agreement theretofore made by him for the preparation of the transcript, being on a contingent basis, was contrary to public policy and therefore void; that nevertheless he was willing to proceed with the preparation of the transcript provided petitioner entered into a new agreement with him to pay for the transcript as delivered at the rate of 22½ cents a folio. Rappaport's motion was heard in department 12 at the time set, and at the conclusion of the hearing the judge of said department made the order here under review. It covers some 25 pages of the typewritten record, and analyzed shows the following: first, it declares void for want of jurisdiction the order made on January 4, 1939, by the judge of department 34, directing Rappaport to proceed immediately with the preparation of the transcript in accordance with the agreement theretofore made by him; secondly, it decrees that said agreement is void as being in its nature contrary to public policy; third, it extended the time to file the transcript to March 31, 1939; and fourth, it provided that if before the expiration of the time granted, petitioner entered into the new arrangement with the reporter on the terms proposed by him in said letter, or one otherwise satisfactory to him, which would be free from any contingent features, and if within the time granted petitioner gave "some assurance to the court of willingness to pay for a transcript" at the statutory rate, the reporter would be directed to proceed with the preparation of the transcript and further extensions of time would be granted to complete and file the same.

[1-3] We are of the opinion that in making the foregoing order the judge of department 12 exceeded his jurisdiction. The state Constitution (art. VI, sec. 6) provides for but one superior court in each county and that for each of said courts at least one judge shall be elected; it further provides that there may be as many sessions of said court at the same time as there are judges elected, appointed or assigned thereto, and that the judgments, orders and proceedings of any one session of the superior court held by any one or more of the judges thereof shall be equally effectual as though all the judges of said court presided at such session. Accordingly, it has been held that jurisdiction is vested by the Constitution in the court and not in any particular judge or department thereof; and that whether sitting separately or together, the judges hold but one and the same court. Graziani v. Denny, 174 Cal. 176, 162 P. 397. It follows, therefore, that where a proceeding has been duly assigned for hearing and determination to one department of the superior court by the presiding judge of said court in conformity with the rules thereof, and the proceeding so assigned has not been

finally disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. People v. Wong Bin, 139 Cal. 60, 72 P. 505. In other words, while one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts. Cottrell v. Cottrell, 83 Cal. 457, 23 P. 531. If such were not the law, conflicting adjudications of the same subject-matter by different departments of the one court would bring about an anomalous situation and doubtless lead to much confusion. Giffen v. Christ's Church, 48 Cal.App. 151, 191 P. 718.

[4, 5] Here, as will be noted, at the time the judge of department 12 made the order under review, the proceeding which had been duly assigned to department 34 for hearing and determination had not been finally disposed of therein. The contempt proceeding invoked for the enforcement of the court's previous order was still pending, and during the pendency thereof the judge of department 12 made the order in question, the obvious purport of which was to nullify the proceedings which were then taking place in department 34. This the judge of department 12 was without jurisdiction to do. As said in People v. Wong Bin, supra, the judge presiding in one department has the power to make and enforce all orders necessary for the disposition of the proceeding that has been assigned to his department, and no judge sitting in any other department can interfere with him in the exercise of such power.

[6, 7] The recitals embodied in the order under review indicate that the judge of department 12 proceeded upon the theory that the proceedings which were being carried on in department 34 were "void on the face of the record". But the reasons set forth in the order do not warrant such conclusion. One of the principal ones given is that the proceeding involving the controversy over the preparation of the reporter's transcript properly belonged in department 12 wherein the cause had been tried on the merits. As above pointed out, however, the provisions of said section 67a and the rule of court to which reference has been made confer upon the presiding judge of the superior court full power of assignment. And in any event, it is well settled that if one department of a court exercises authority in a matter which might properly be heard in another, the action constitutes at most an irregularity and does not affect the jurisdiction. In re Johnson's Estate, 101 Cal.App. 110, 281 P. 435; Graziani v. Denny, supra; Carter v. Lothian, 133 Cal. 451, 65 P. 962.

[8] The second main reason given is that the orders made by the judge of department 34 were founded on an unlawful agreement. In this respect the order under review reads: "For the reasons indicated, the court finds, adjudicates and decrees that the said agreement between said Samuel Rappaport and the plaintiff is contrary to public policy, is therefore unlawful, and void and that neither party to it can have or claim any rights, or enforce any remedies, thereunder." Manifestly, however, neither in the kind of a proceeding which was then being heard before department 12, nor under the circumstances there present, did the court have jurisdiction of the parties or the subject-matter to hear and adjudicate the question of the validity of said agreement, nor to define the legal rights of the parties thereunder. Such adjudication may be made only through the medium of an action brought for that purpose after the reporter delivers the transcript. Gjurich v. Fieg, 160 Cal. 331, 116 P. 745; Harris v. Burt, 47 Cal.App. 480, 190 P. 1058. In the two cases just cited, undertakings were given by the appellants in conformity with the provisions of said section 953b; but the reporters refused to prepare and deliver the transcripts until their fees were actually paid; and in each case it was held that inasmuch as the appealing party had complied with all of the requirements demanded by the statute to obtain the transcript he was entitled to the delivery thereof, and that any dispute as to the fees was a matter to be litigated afterwards in an action brought for that purpose. In so holding, the language used by the court in the former case was as follows [160 Cal. 331, 116 P. 746]: "To say that the law contemplates the payment of the demand of the stenographic reporter at the time when the transcript is presented to the clerk for filing is to deprive the appellant of any right to object to the fees charged, or by objecting force the appeal to await the final determination of this controversy between the stenographic reporter and the appellant. The law desires and

urges a speedy determination of appeals, and it is not to be supposed that it ever contemplated either such injustice to an appellant, or the delaying of an appeal to settle such a minor separate controversy. The true, and we think the obvious, construction of the statute is that the undertaking given to the clerk is security until such time as the exact amount due to the reporter can be known, and that this cannot be known until the final approval of the transcript by the judge. Thereupon and thereafter the appellant becomes liable for the just fees of the stenographic reporter so determined and upon his failure to pay them recourse may be had against him and the sureties on his undertaking filed with the clerk." The situation in the present case is no different in principle. Here the appellant complied with all of the requirements of the statute to obtain the transcript. True, she did not give an undertaking to insure the payment of the cost of the transcript as was done in those cases, but as permitted by the express provisions of the statute she arranged personally with the reporter for his compensation, whereupon the reporter filed a waiver of the giving of an undertaking. It reads as follows: "The appellant in the matter above entitled having arranged personally with me for the payment of my compensation in connection with the preparation of the reporter's transcript and all exhibits in the case preparatory to appeal and making up said record under section 953a of the Code of Civil Procedure, I hereby waive the necessity of filing an undertaking under the provisions of said Code of Civil Procedure, relying upon the arrangement of said appellant for such compensation." Therefore, when the matter of the application for the order to compel the reporter to proceed with the preparation of the transcript came on for hearing before department 34, the sole question before the court was whether petitioner had complied with all necessary legal requirements to obtain the transcript. Admittedly she had; and accordingly the order was made directing the reporter to prepare and deliver the transcript. If after the delivery of the transcript a dispute should arise between the petitioner and the reporter as to the amount the reporter is legally entitled to receive, his recourse would be, as outlined in the Gjurich case, an action in the ordinary course of law to collect the same, which necessarily would involve a determination of the question of the validity of the agreement theretofore entered into between the parties. There is nothing in the terms of any of the orders made by the judge of department 34 which precludes the reporter from invoking such remedy, for nowhere therein does the judge of said department purport to adjudicate the question of the validity of said agreement. In fact neither at the hearing on January 4, 1939, nor at any prior time did the reporter, in any manner, question the validity of the agreement. Respondents claim that the issue of its validity was raised by Rappaport's motion of February 24, 1939, to set aside the order of January 4, 1939; but the record before us does not show the grounds of that motion nor the reasons for its denial. It may be well assumed, therefore, that if issue was so raised, the order of denial was based upon the ground that the court was without jurisdiction in that kind of a proceeding to inquire into the merits thereof. The remaining jurisdictional matters referred to in the order under review are of less importance than those above discussed, and therefore do not require special notice.

[9] One more point is presented. Respondents call attention to that part of the record showing that petitioner took an appeal from the order she seeks by this proceeding to annul, and authorities are cited to the effect that if an order is appealable, certiorari will not lie. It is apparent, however, that it is not appealable under section 963 of the Code of Civil Procedure as a special order made after final judgment, because such an order to be appealable must affect the judgment in some manner or bear some relation to it, either by way of enforcing or staying its execution (Lake v. Harris, 198 Cal. 85, 243 P. 417; Griess v. State Investment, etc., Co., 93 Cal. 411, 28 P. 1041; Kaltschmidt v. Weber, 136 Cal. 675, 69 P. 497; Watson v. Pryor, 49 Cal. App. 554, 193 P. 797; 2 Cal.Jur., p. 153); nor does it fall within the classification of any of the other orders specified in said section.

For the reasons and upon the grounds stated, the demurrer to the petition for the writ is overruled and the order made by the judge of department 12 on February 28, 1939, is annulled.

We concur: SHENK, J.; CURTIS, J.; HOUSER, J.; SPENCE, Justice pro tem.

14 Cal.2d 670

ESTRIN v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

Sac. 5337.

Supreme Court of California.

Nov. 30, 1939.

1. Certiorari 🔑49

On certiorari to review judgment of Superior Court, wherein respondents filed a demurrer, petitioner was not required to provide appellate court with transcript of proceedings had in Superior Court, since the effect of the demurrer was to adopt as the return to the writ, the facts alleged in the petition. Code Civ.Proc. §§ 1070, 1071.

2. Certiorari 🔑1, 9, 28(1)

A writ of "certiorari" is an extraordinary remedy, equitable in its nature, the issuing of which rests in the sound discretion of the court, and it lies only when final determination of an inferior court, tribunal, or board is in excess of its jurisdiction. Code Civ.Proc. § 1068.

[Ed. Note.—For other definitions of "Certiorari," see Words & Phrases.]

3. Pleading 🔑372

In determining issues raised, the pleadings of both parties must be considered. Code Civ.Proc. §§ 437, 462, 588, 590.

4. Judgment 🔑252(1, 2)

In contested cases, relief granted is not limited to that specifically prayed for, as in case where judgment goes by default, but any relief authorized by facts alleged and proved, or admitted, may be awarded, and defendant by answering may enlarge scope of relief to any extent consistent with pleadings and embraced within the issues.

5. Pleading 🔑34(3)

The rule with respect to construction of a pleading for purpose of determining effect is that its allegations must be liberally construed, with view to substantial justice between the parties, but there may not be inserted in a pleading by construction vital pretermitted averments, or averments which are neither directly set forth therein nor reasonably within fair import of language of those which are set forth. Code Civ.Proc. § 452.

6. Pleading 🔑384

In action by vendor of electric sign against purchaser for purchase price, brought on express contract, in which purchaser alleged that sign was not installed in accordance with contract, the answer enlarged issue tendered by complaint, so as to render admissible evidence with respect to amount of reasonable value of sign if sign was found not to have been installed in accordance with contract.

7. Judgment 🔑251(1)

In action by vendor of electric sign against purchaser for purchase price brought on express contract, in which purchaser alleged that sign was not installed in accordance with contract, trial court did not go outside the issues in imposing liability on purchaser for reasonable value of sign, in view of allegations of pleadings, where there was evidence that purchaser retained sign, notwithstanding his asserted objections thereto.

8. Judgment 🔑251(1)

A party is entitled to any and all relief which may be appropriate under the scope of his pleading, and within the facts alleged and proved, irrespective of theory upon which relief may be alleged.

9. Certiorari 🔑29

If pleadings were not broad enough to justify relief granted by Superior Court, the error committed was merely an error in exercise of jurisdiction, and was not an act in excess of its jurisdiction, and hence certiorari would not lie to review Superior Court's judgment. Code Civ.Proc. § 1068.

◆

In Bank.

Certiorari proceeding by Sidney E. Estrin, individually and doing business under the fictitious name and style of Estrin's Style Shop, against the Superior Court of the State of California, in and for the County of Sacramento, and Honorable Martin I. Welch, Judge thereof, and the Novelty Electric Sign Company, a corporation, wherein petitioner seeks to review findings and a judgment of the Superior Court of Sacramento County. On demurrer and motion to dismiss the proceeding.

Demurrer sustained, and judgment of Superior Court affirmed.

Prior opinion, 91 P.2d 912.

Busick & Busick, of Sacramento, for petitioner.

Robert H. Schwab, of Sacramento, and Richard S. Goldman, of San Francisco, for respondents.

PER CURIAM.

A hearing was granted by this court in the above-entitled action after the District Court of Appeal had dismissed proceedings following the issuance of a writ of certiorari, by which the petitioner Estrin sought to have reviewed proceedings theretofore had in the superior court on a trial de novo, after an appeal had been taken to that court from a justice's court. On the return day the respondents filed a demurrer to the petition, together with a motion to dismiss the certiorari proceedings for the reason that the petitioner had failed to file a certified transcript of the proceedings sought to be reviewed, as required by a direction of the District Court of Appeal, pursuant to the provisions of sections 1070 and 1071, Code of Civil Procedure. The dismissal was granted on the grounds advanced in the motion. No ruling was made on the demurrer to the said petition, and the hearing herein was granted in order to give further consideration to the contention of the petitioner that, inasmuch as the filing of the demurrer had the effect of admitting the facts set forth in his petition, he was not required to provide the appellate court with a transcript of the proceedings had in the trial court.

[1] That contention must be upheld. In the case entitled Bryant v. Superior Court, 16 Cal.App.2d 556, 566, 61 P.2d 483, 488, it was said: "The effect of the demurrer to the petition [was] to adopt as the return to the writ the facts alleged therein (Burlingame v. Justice's Court, 1 Cal.2d 71, 33 P.2d 669) * * *." And in the case last cited, in which the appeal was from a judgment of the superior court in a certiorari proceeding, wherein the latter court had annulled an order of the justice's court, it was said [1 Cal.2d 71, 33 P.2d 670]: "The matter was submitted to the court on a demurrer to the petition. The effect of the demurrer was to adopt as the return to the writ the facts alleged in the petition. Stoner v. City Council of Los Angeles, 8 Cal.App. 607, 97 P. 692. The facts set forth in the petition are therefore uncontroverted * * *." To the same effect is the case entitled Holmes v. Justice's Court, 19 Cal.App.2d 362, 364, 65 P.2d 820, 822, wherein the court said: "When the petitioner herein asked for a writ of review and pleaded all the proceedings had in the Justice's Court, the demurrer to that petition made the petition the return upon which the review should have been heard. * * * The sole issue before the court was whether the Justice's Court exceeded its jurisdiction in ordering the perpetual stay of execution, and that issue could be determined upon examination of the record of the Justice's Court as pleaded in the petition and admitted by the return." See, also, Stewart v. Superior Court, 101 Cal. 594, 36 P. 100; 4 Cal.Jur. p. 1094.

Passing to a consideration of the averments of the petition,—in the light of the effect of the demurrer,—from the facts set forth therein it appears that: On or about September 3, 1937, the plaintiff, Novelty Electric Sign Company, a corporation, filed an amended complaint in an action pending in the justice's court, in which the petitioner herein was named as defendant. By the allegations of the complaint the plaintiff sign company stated a cause of action for the recovery of a judgment against the defendant in the sum of $556.20, based upon an agreement in writing made and entered into between the plaintiff and the defendant on or about the 15th day of September, 1936, by the terms of which agreement the plaintiff agreed to construct and sell to the defendant a Neon electric sign, and to install the same upon the premises operated by the defendant under the name of Estrin's Style Shop. It was further alleged that the defendant agreed to pay to the plaintiff as consideration for the agreement the total sum of $556.20, within thirty-five days after completion and installation of the sign, but that no part of such sum had been paid. The complaint also contained a separate cause of action against the defendant for recovery of the sum of $125, which, it was alleged, represented the cost of work, labor and services furnished by the plaintiff to the defendant at the latter's instance and request.

In his answer to the complaint the defendant admitted the execution of the said written agreement for the purchase by him of an electric sign, but alleged that the sign thereafter installed by the plaintiff did not comply with certain specifications with respect to quality, as set forth in the agreement, and, further, that it was not installed in accordance with the terms of the said agreement. After trial was had in the justice's court on those issues, judgment was rendered in favor of the defendant. Thereupon the plaintiff sign company filed its appeal in the superior court, and a trial de novo was had therein, the court sitting without a jury. The superior court made findings in favor of the appellant sign company and rendered its judgment in accordance therewith. Thereafter the defendant made a motion for a new trial, which the court denied.

The findings recited that: "* * * plaintiff agreed to construct and sell to defendant a Neon electric sign and to install said sign on the premises operated by defendant in Sacramento, California, and service the same for a period of one year after installation; that plaintiff did construct and install a Neon electric sign, * * and said sign as finally installed, was accepted by defendant and used continuously by him since the date of installation"; that, as agreed upon with said defendant, and "for a period of one year after installation", the plaintiff "serviced said sign and kept the same in operating condition during said period"; and that the "reasonable value of the construction, installation and servicing of the sign is the sum of $517.20". The court also found that all the allegations in the answer of the defendant which were inconsistent with the foregoing findings were "untrue and unsupported by evidence".

The principal contention of petitioner herein is that the superior court exceeded its jurisdiction in rendering a judgment based on a finding as to the "reasonable value of the construction, installation and servicing of the sign", whereas the complaint set out a cause of action on an *express* contract. Petitioner asserts that at the trial he objected to the reception of evidence relating to an implied contract; that findings based thereon were wholly outside the issues presented by the pleadings and, therefore, that the making of such findings was in excess of the court's jurisdiction. On the other hand, the respondents contend that the matters complained of by petitioner did not amount to the performance of acts in excess of the court's jurisdiction, but that, at most, they merely constituted error on the part of the superior court in pursuance of its authority to act in the matter. Code Civ.Proc. § 1074. If the latter contention is correct, the demurrer should be sustained and the judgment affirmed.

[2] It is well settled that the writ of certiorari will not lie unless it can be said that the inferior tribunal has *exceeded* its jurisdiction. Code Civ.Proc. § 1068. As was said in the case entitled Howe v. Superior Court, 96 Cal.App. 769, 772, 274 P. 992, 993, "The writ of certiorari is an extraordinary remedy, equitable in its nature, the issuing of which rests in the sound discretion of the court." It lies only when the final determination of an inferior court, tribunal, or board is in excess of its jurisdiction. "The language of the section [Code Civ.Proc. § 1068] limits it to cases where the tribunal 'has exceeded' its jurisdiction." Holabird v. Railroad Commission, 171 Cal. 691, 694, 154 P. 831, 832; Sayers v. Superior Court, 84 Cal. 642, 24 P. 296.

To the same effect is the case entitled McLaughlin v. Industrial Accident Comm., 87 Cal.App. 469, 470, 262 P. 53, where the court said: "In order that relief by certiorari may be granted, there must have been an excess of jurisdiction by a tribunal exercising judicial functions; and an excess of jurisdiction is to be distinguished from errors of either law or fact committed by a judicial tribunal within the limits of its jurisdiction. In the Matter of Hughes, 159 Cal. 360, 363, 113 P. 684; Karry v. Superior Court, 162 Cal. 281, 122 P. 475, 128 P. 760." See, also, authorities cited in Vol. 3, Cal.Jur., 10-Yr. Supp., p. 363.

Likewise, in the case entitled Monreal v. Bush, 46 Cal. 79, it was said (syllabus) that, "Certiorari does not lie to review an erroneous judgment which the Court below *had jurisdiction to render*", and it was there held that rendition of a judgment for a demand which was not due when the action was commenced was not an act in excess of jurisdiction, but was merely error in the exercise of jurisdiction. (Italics added.)

In the case of Karry v. Superior Court, 162 Cal. 281, 284–286, 122 P. 475, 476, 128 P. 760, the distinction between error in the exercise of jurisdiction and a judgment rendered in excess of jurisdiction is discussed. In that case the court said, "a court has jurisdiction to decide wrongly as well as correctly; and the only remedy of a party aggrieved by a merely erroneous decision is such as may be afforded by our statutory provisions relating to motions for a new trial and appeals. If no such remedy be given, the action of the trial court, *within its jurisdiction*, is conclusive. * * * We have here no different case in principle from the one we would have if the action had been one on a promissory note for $100, appealed to the superior court, and not only the answer and the uncontradicted evidence, but also the findings, showed that the note had been fully paid, and nevertheless the superior court had given judgment in favor of the plaintiff for the full amount of the note. Such a judgment would, of course, be erroneous; but there would have been no excess of jurisdiction, and the aggrieved party would have been without any remedy by way of certiorari. A judgment that fails to accord to a party his legal rights is, of course, always to be regretted. But there must be a point in every proceeding beyond which the law will not permit further controversy as to the merits of the case. In actions of the character of the one under consideration, * * * the final appellate jurisdiction is in the superior court. Even if the judgment of that court on the merits was clearly erroneous in this case, a question we do not decide, it is final and conclusive; no excess of jurisdiction being made to appear." See, also, to the same effect, Borchard v. Board of Supervisors, 144 Cal. 10, 14, 77 P. 708.

[3] However, in the instant case it is contended by the respondents that the findings were not in fact outside the issues raised by the pleadings. Petitioner's contention that plaintiff's recovery, if any, must have been based only on the allegations of his complaint is not tenable. In determining the issues raised, the pleadings of *both* parties must be considered. 14 Cal.Jur., p. 973. In view of the admissions and the other matters set up by defendant in his answer in the instant case, the issues before the court necessarily would not be limited to the allegations of the complaint. Thus in the case entitled Rogers v. Riverside Land, etc., Co., 132 Cal. 9, 11, 64 P. 95, 96, the court said: "Appellant's counsel is mistaken in supposing that issues in a cause can be raised only by allegations in the complaint controverted by the answer. Very frequently the most important issues tried in a cause arise outside of the allegations in the complaint. In addition to the denials contained in the answer, it may contain a statement of new matter constituting a defense; and the statement of such new matter in the answer on the trial is deemed controverted by the opposite party, and an issue arises from such new matter in the answer thus controverted by implication of law. Code Civ.Proc. §§ 437, 462, 588, 590."

[4] Also, in 14 Cal.Jur., pp. 986, 987, the rule is stated that "* * * in contested cases the relief granted is not limited to that specifically prayed for, as is the case where judgment goes by default; any relief authorized by the facts alleged and proved or admitted may be awarded. The defendant, by answering, may enlarge the scope of the relief to any extent consistent with the pleadings and embraced within the issues. Hence relief, though not specifically prayed for, may be granted with respect to matters as to which an issue is raised by the denials and averments of the answer". Again, at page 990, it is said, "Since there is but one form of civil action under the code the court may grant any relief embraced within the issues. The fact that a party has misconceived the relief to which he is entitled does not alone justify a total denial of relief, but a plaintiff may recover if his complaint states any cause of action entitling him to any relief either at law or in equity." Likewise, it is stated in Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 768, 771, 97 P. 919, 920, "Under our liberal system of pleading and practice plaintiff is not [to be] denied any relief, if justified by his pleading and evidence, simply because he fails to prove that he is entitled to the full measure that he claims."

[5] To the same effect is the case entitled Howard v. D. W. Hobson Co., 38 Cal.App. 445, 449, 452, 176 P. 715, 717, where it is said: "The rule in this state with respect to the construction of a pleading, for the purpose of determining its effect, is that its allegations must be liberally construed, with a view to substantial justice between the parties. Code Civ.Proc. § 452. It is not to be assumed from that rule of construction, however, that by construction there may be inserted in a pleading vital pretermitted averments, or averments which are neither directly set forth therein nor reasonably within the fair import of the language of those which are set forth. But if the averments themselves may, without a strained construction, or without doing violence to language, be held clearly to imply or state a fact essential to the statement of a cause of action or to the support of the theory upon which reliance must be had to make out a case or a defense, then the rule of the Code should be invoked and the pleading construed with a view to the promotion of substantial justice between the parties to the action."

[6-8] An analysis of the pleadings in the instant case shows that an express contract for the construction and installation of an electric Neon sign was entered into between the parties; that an electric Neon

sign was so installed by plaintiff on the premises of defendant, where it remained; and that defendant had paid nothing to plaintiff as consideration therefor. It was also alleged in the complaint that plaintiff had "fully performed all of the conditions of said agreement on its part to be performed". That allegation was denied in the answer, and it was affirmatively alleged therein that the sign that was erected was neither constructed nor installed in accordance with the terms of the express agreement; and that defendant had refused to accept the sign and had requested its removal. Therefore, it appears that the answer sufficiently enlarged the issue tendered by the complaint to have permitted the reception of evidence relating to the question whether the sign so constructed and installed on defendant's premises was in accordance with the specifications of the agreement and thus entitled plaintiff to the full contract price; also, evidence thereby was admissible with respect to the amount of the reasonable value of said sign if it was found not to have been so constructed and installed, as alleged in the answer, but nevertheless had been accepted and retained by defendant. The trial court found that "said sign *as finally installed* was accepted by defendant and *used continuously by him since the date of installation*" (Italics added) and that, "as agreed upon with said defendant", plaintiff "serviced said sign and kept the same in operating condition" for the period of one year after its installation. In the absence of a transcript of the evidence, we may assume that sufficient evidence was adduced to support those findings. Nor do we understand that they are challenged as being without evidentiary support. Considering the allegations of the pleadings, if there was evidence to show that defendant retained the sign, notwithstanding his asserted objections thereto, it may not fairly be urged that the trial court went outside the issues in imposing liability on him for the reasonable value thereof. A party is entitled to "any and all relief which may be appropriate under the scope of his pleadings and within the facts alleged and proved, irrespective of the theory upon which they may be alleged. Haight v. Stewart, 36 Cal. App. 514, 172 P. 769; Corey v. Struve, 170 Cal. 170, 172, 149 P. 48." Lacey v. McConnell, 9 Cal.App.2d 6, 9, 48 P.2d 161, 163. To the same effect, see, also, McLean v. Ladewig, 2 Cal.App.2d 21, 25, 37 P.2d 502; McAllister v. Union Indemnity Co., 2 Cal. 2d 457, 460, 42 P.2d 305.

[9] Even if we were to assume, for the purpose of illustration only, that the pleadings interposed by the parties in the instant case were not broad enough in their scope to justify the relief granted by the superior court, the error committed would have been merely an error in the exercise of jurisdiction. The court had jurisdiction of the parties and of the subject-matter. It had the authority to hear and determine, and to render a judgment on the issues presented. Manifestly, the rendition of the judgment was not an act in excess of the jurisdiction of the court.

The demurrer is sustained, and the judgment is affirmed.

---

14 Cal.2d 693

PEOPLE v. WALLER.

Cr. 4243.

Supreme Court of California.

Nov. 30, 1939.

1. Homicide 🔑354

A verdict of guilty on a charge of murder, without recommendation as to punishment, calls for imposition of the death penalty.

2. Homicide 🔑235

Evidence sustained conclusion that murder and assault with intent to commit murder were committed during the perpetration of, or attempt to perpetrate, a robbery.

3. Homicide 🔑268

In prosecution for murder and assault with intent to commit murder, sufficiency of identification of accused was for the jury.

4. Homicide 🔑234(1)

The value of testimony identifying accused charged with murder and attempt to commit murder is not destroyed by fact that the testimony is not positive.

5. Criminal law 🔑351(3)

The flight of accused through several states under various aliases to avoid detection and arrest, immediately after commission of alleged murder and assault with intent to commit murder, was in itself to be considered as evidence of a consciousness of guilt.

6. Criminal law ⚷351(5)

Testimony showing that an accused has assumed aliases may be considered as tending to prove that he was endeavoring to conceal his identity after commission of the crime.

7. Criminal law ⚷507½

The testimony of one who, on another trial, had been acquitted did not require the corroboration required of an accomplice's testimony, in absence of anything in the record to establish that she was an accomplice.

8. Homicide ⚷235

Evidence sustained conviction for murder committed during the perpetration of or attempt to perpetrate, a robbery, particularly in view of fact that accused offered no evidence and did not take witness stand in his own behalf, notwithstanding lack of evidence that accused shot either homicide victim or assault victim, or that accused was armed at time of robbery. Const. art. 1, § 13.

9. Homicide ⚷30(2)

If a homicide is committed by one of several confederates while engaged in perpetrating a robbery in furtherance of a common purpose, the persons engaged with him are equally accountable and such killing is murder of the first degree, irrespective of whether killing was intentionally or accidentally done.

10. Homicide ⚷354

Having found accused guilty of first degree murder, the matter of penalty was in jury's discretion.

11. Homicide ⚷329

Where jury in homicide prosecution was properly instructed as to its power to relieve accused from death penalty if in exercise of its discretion the facts warranted, but failed to do so, the Supreme Court could not interfere therewith on appeal.

12. Homicide ⚷257(8)

Undisputed testimony showing that victim was beaten on head with a pistol and shot twice justified finding that assault was committed with intent to kill.

In Bank.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Leo Waller was charged with murder and with assault with intent to commit murder, and verdicts of guilty were returned on both counts. The jury found by its verdict as to the first count that crime committed was murder of the first degree, and made no recommendation as to punishment. The cause was brought before the Supreme Court on an automatic appeal from judgment of conviction on first count.

Judgments of conviction affirmed.

Beecher S. Stowe, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

KNIGHT, Justice pro tem.

[1] The district attorney of Los Angeles county filed an information charging the defendant Leo Waller in separate counts with the murder of Presley B. Stewart, and with having committed an assault with intent to commit murder upon the person of Dan Preston. It was also charged therein that said defendant had been previously convicted of burglary, for which he had served a term of imprisonment in the state of Illinois. He entered a plea of not guilty to the charge made in each count and admitted the prior conviction. The trial took place before a jury, and verdicts of guilty were returned against him on both counts. As to the first, the jury found by its verdict that the crime committed was murder of the first degree, and made no recommendation as to punishment. Therefore the verdict called for the imposition of the death penalty. A motion for new trial was made and denied, and following the pronouncement of sentence in accordance with the verdicts of the jury, the cause was brought before this court on an automatic appeal from the judgment of conviction on the first count and from the order denying the motion for new trial thereon.

[2] It appears from the record without any dispute that Stewart was fatally shot and that Preston was beaten and shot shortly after one o'clock on Sunday morning, March 20, 1938, and that the shooting took place in "The Bee Hive Cafe" on East Whittier boulevard in Los Angeles; and it was claimed by the prosecution that both crimes were committed during the perpetration or attempt to perpetrate a robbery therein by several persons, including the defendant. Those accused be-

sides defendant were John Robles, Harry Groves, George Braun, and Mrs. Ann Groves, the wife of Harry Groves. A few days after the shooting Braun and Mrs. Groves surrendered to the police in San Diego, and shortly afterwards Robles and Groves were captured in Kansas City, Missouri. They were all returned to Los Angeles, charged jointly with the commission of said crimes, and placed on trial before a jury. After the trial started Robles withdrew his plea of not guilty to the charge of murder, pleaded guilty thereto, and was subsequently sentenced to life imprisonment. Mrs. Groves was acquitted, and the remaining two were found guilty, the jury having declared by its verdict that it was murder of the first degree, and life imprisonment was recommended. Braun alone appealed, and on March 21, 1939, the judgments of conviction as to him were reversed. People v. Braun, 31 Cal.App.2d 593, 88 P.2d 728. Pending Braun's appeal the defendant Leo Waller was arrested in Danville, Illinois, and returned to Los Angeles; and on May 15, 1939, he was placed on trial with the result above stated.

In furtherance of his appeal his counsel has filed briefs wherein the several grounds urged for reversal are fully and ably presented and discussed. They all relate to the question of the sufficiency of the evidence, the substance of the major contentions made in this behalf being, first, that the evidence is legally insufficient to support the implied finding of the jury that the alleged crimes were committed during the perpetration or attempted perpetration of a robbery; and secondly, that in any event it is insufficient to establish the fact that the defendant herein was in the cafe at the time of the alleged commission of the crimes, or if present that he participated therein or was a party thereto. After a careful examination of the record we are unable to agree with either of the contentions so made.

The shooting of Stewart and Preston took place, as stated, shortly after one o'clock on Sunday morning. A few minutes before the shooting occurred a group of three men entered the cafe, walked to the bar and ordered drinks. The cafe at the time was filled with forty or more patrons, a large number of whom were sitting on stools or standing in front of the bar; others were seated at tables, and some were playing mechanical devices and musical instruments. Among the patrons present were Braun and Mrs. Groves. They had entered the cafe together several minutes before the group of three men appeared therein. The bar ran lengthwise of the cafe, and drinks were being served over the bar by two bartenders. One of them was an employee named Donahue, and the other was Stewart, the proprietor. Donahue waited on patrons at the end of the bar nearest the front door, and Stewart was stationed at the farther end. Donahue served the three men with drinks, and one of them intentionally or accidentally broke his glass on the bar, which caused a slight commotion; whereupon Donahue served him with another drink; meanwhile one of the men moved farther down along the bar toward the rear of the cafe and beckoned to Donahue. As Donahue approached, the man said to him, "Buddy, this is a stickup". Believing the man was joking, Donahue turned and walked back toward the other end of the bar and while passing Stewart said to him, "This guy says it is a stickup". Stewart glanced toward the man who had said it, and then reached down behind the bar and drew a pistol. Instantly several shots were fired, and there was much confusion. Some of the patrons dashed for the exits, while others lay down on the floor or stood with their hands raised above their heads. Just before the shooting began Preston was seated in front of and facing the bar, and hearing a disturbance he turned around and saw one of the group standing behind him pointing a pistol at someone behind the bar. He grappled with the man and was struck on the head with a pistol and shot twice, once in the arm and again across the chest. Another patron named Rohrscheib stood near the front door with his hands raised and was accosted by two of the group. One of them held a pistol, and the other demanded Rohrscheib's "roll". He replied that he had none, and the man then leaned over to search Rohrscheib's hip pockets. As he did so Rohrscheib grappled with the man and while they were wrestling the man who held the pistol struck Rohrscheib on the head, knocking him down, and when he arose the man struck him in the face with a peanut vending machine. After the three men had fled Stewart was found lying unconscious behind the bar, mortally wounded with a bullet hole through his head, and Preston was found lying unconscious in front of the bar. It was also found that approximately $50 was missing from the cash register, which was located on the back bar close to the spot where Stewart was standing when shot; and during the confusion caused by the shooting one of the group was seen behind the bar.

Clearly the foregoing facts are legally sufficient to support the conclusion reached by the jury that Stewart was murdered and Preston assaulted during the perpetration or attempt to perpetrate a robbery. Counsel for defendant points out that there is no direct evidence showing that any one of the group took the money from the cash register; but in this regard the testimony shows that Donahue counted the cash in the register when he went on duty that evening; that upon returning to the bar immediately following the shooting he found one of the drawers of the register open, and soon afterwards when the police arrived he checked the money in the register with the tape upon which the sales are recorded and found that approximately $50 was missing; and in connection therewith it was shown also, as stated, that instantly before the shooting began one of the group said to Donahue, "Buddy, this is a stick-up", and that before the group fled one of them was seen behind the bar where the register was located. Moreover, and quite apart from the matter of the money missing from the cash register, there is the direct testimony showing the attempt to rob Rohrscheib.

[3] The evidence establishing defendant's participation in the crimes was both direct and circumstantial. The direct evidence consisted of testimony given by Mrs. Groves and Rohrscheib, bearing upon the identification of the defendant as the man with whom Rohrscheib was grappling in resisting the attempt to rob him. The identification of him by Mrs. Groves was made in positive terms. The circumstances relating thereto, as they are shown by her testimony, were these: For nearly a week immediately prior to the commission of the crimes Mrs. Groves, her husband, and the defendant lived together in the Commander Apartments on Ingraham street in Los Angeles; and all three were well acquainted with Robles. Mrs. Groves had known him many years; and on the day preceding the shooting he was visiting the Groves and the defendant at their apartment. That afternoon all four began drinking, and they continued to drink during the evening. About ten o'clock that night they visited the home of a Mrs. Martinson in the neighborhood. Braun was there also, and more liquor was consumed. While there Mrs. Groves undertook to teach the defendant to dance, and their actions angered Groves. A quarrel ensued between Groves and his wife, and he struck her. Thereupon, she left the place in company with Braun, and after driving about for a while in Braun's automobile, visiting several cocktail bars, they went to the Bee Hive. They arrived there some time after 12:30, and after they had been there for some little time Mrs. Groves heard someone near the bar say, "This is a stick-up". She looked around and saw her husband and Robles. Instantly the shooting began, and several shots were fired. During the confusion she observed Stewart standing behind the bar with a pistol in his hand, and fire. She also saw Robles in front of the bar holding a pistol, saw him striking Preston over the head with it; and afterwards she saw him behind the bar. As to the defendant, she testified that she first saw him standing in the cafe near the front, and that after the commotion started she saw him grappling with Rohrscheib. In this regard, the essential portions of the testimony given by her on direct examination were as follows:

"Q. * * * Now, I will call your attention to the defendant, Leo Waller; you saw Leo Waller there that night, did you not? A. Yes.

"Q. What was the defendant, Leo Waller doing, if anything? A. I don't think he was doing anything; just standing.

"Q. Where was Leo Waller when you first saw him? A. Oh, I believe, he was in the front of the cafe.

"Q. He was in the front of the cafe? A. Yes. * * *

"Q. You also stated that you saw Mack Rohrscheib there; is that correct? A. Yes.

"Q. Did you see anything happen between Mack Rohrscheib and the defendant Leo Waller? A. Well, not until all the commotion started and everybody was grabbing each other.

"Q. All right. After the commotion started then did you see Leo Waller doing anything in the cafe? A. Well, when they were all in the—that Rohrscheib just grabbed Leo.

"Q. You saw Mr. Rohrscheib grab Leo Waller, the defendant in this case; is that right? A. Yes, he was standing there.

"Q. All right. What did you see the two of them do, if anything? A. Nothing, just holding on to each other.

"Q. Well, what do you mean by holding onto each other? * * * A. Oh, I cannot remember everything, I mean every detail, how they were holding each other."

Thereupon the court directed that the last question be read to the witness, and in response she answered, "Well, I would say they were wrestling. Q. By Mr. Galliano (deputy district attorney): Then you saw Mr. Rohrscheib and Mr. Waller, the defendant in this case, wrestling, is that what you mean? A. Yes." The witness was subjected to a rigid and thorough cross-examination upon the subject of her identification of the defendant, but throughout she steadfastly maintained that she saw the defendant in the cafe on the night in question under the circumstances above stated. In discussing her testimony on this appeal counsel for the defendant vigorously assails her credibility as a witness. He points out that according to her own testimony she had been drinking excessively most of the afternoon and evening, and he argues therefore that no value whatever can be attached to her identification of the defendant. He also calls attention to certain discrepancies between her testimony and that given by Rohrscheib as to the kind of clothing worn by the man with whom Rohrscheib grappled. As stated, however, in the case of People v. Farrington, 213 Cal. 459, 2 P.2d 814, 815: "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction." See, also, People v. Radovich, 122 Cal.App. 176, 9 P.2d 542, citing numerous cases.

[4] Rohrscheib's identification was that while he would not say positively that the defendant was the man who attempted to rob him, that he "looked like him",—that he "resembled him"; and in this connection he was asked this question: "Calling your attention to the defendant, Waller, you think now that the man that you saw there is similar or looks like Mr. Waller, is that right?" and he answered "yes". The fact, however, that he was not positive does not destroy the value of the identification. As said in People v. Wilson, 76 Cal.App. 688, 699, at page 700, 245 P. 781, 785, it is not necessary that the identification be made in positive terms by any of the witnesses. And continuing, the court goes on to say: "A conviction may be sustained, though the witnesses decline to swear positively, and testify merely that they believe the accused is the person whom they saw commit the crime. Thus, in Commonwealth v. Cunningham, 104 Mass. 545, the witnesses would not swear that the prisoner was the man they saw on the stolen wagon, but that 'he resembled him.' There the court said: 'Upon this question of identity, the evidence offered was all of it competent, and proper for the consideration of the jury. It is impossible to say that it had no tendency to convict the defendant. Its sufficiency was to be estimated and weighed exclusively by them.'" Other cases holding that the identification need not be made in positive terms are People v. Rolfe, 61 Cal. 540, 541; People v. Franklin, 46 Cal.App. 1, 188 P. 607; People v. Madsen, 93 Cal. App. 711, 270 P. 237; People v. Radovich, supra. It may be well to state also that Rohrscheib, without qualification, identified Robles as the man who held the pistol and struck him while he was grappling with the man who was attempting to rob him. Such identification was made from having seen Robles personally at the other trial, and from a photograph of him produced at the present trial.

Other important facts and circumstances disclosed by the testimony of Mrs. Groves tending to connect the defendant with the commission of the crimes were the following: As soon as the turmoil in the cafe resulting from the shooting had quieted down, she and Braun left together, and after driving first to Fourth street where they stopped in the street for a few minutes, they continued on to the Groves apartment on Ingraham street. There they found Groves, Robles and the defendant, and after a short discussion among them they decided that all should leave the state; thereupon, about an hour after the shooting, they entered two automobiles and drove first to Cross Roads, California, and thence to Phoenix, Arizona. One of the cars, a Pontiac, was driven by Groves, and he was accompanied by Mrs. Groves and Robles. The other, a Plymouth, was driven by defendant, and Braun rode with him. All remained in Phoenix for a day or two, and then decided to separate. Braun and Mrs. Groves turned back toward California, and eventually reached San Diego, where they decided to surrender to the police. The Pontiac car, it appears, had been stolen in Los Angeles several days prior to the homicide, not, however, by the defendant; and sometime during Sunday, the day of the homicide, the license plates of the car were found in Mrs. Martinson's yard.

[5, 6] The evidence further shows that following defendant's arrest in Illinois he made a statement to the officers wherein he said that he left California the day after the Bee Hive robbery; that upon arriving in Arizona he read in the newspaper about the robbery and the murder. Continuing, he stated that after the five of them had stayed in Phoenix for two or three days he separated from the others and made his way east through several states, including Texas and Oklahoma, up to Illinois; that while doing so he eluded being apprehended by using various aliases, one of them being Jimmie Wallace, and that he had secured a social security card under that name; and that one of the reasons he separated from the others was that the Pontiac in which they were traveling was a stolen car. It will be seen, therefore, that immediately after the crimes had been committed, and having had knowledge of the commission thereof, the defendant fled through several states, assuming aliases to avoid detection and arrest, which in itself may be considered as evidence of consciousness of guilt. As said in People v. Murguia, 6 Cal.2d 190, 57 P.2d 115, "Immediate flight, in the absence of any accusation—in advance, perhaps, of the probability of an accusation, formal or informal—may afford persuasive evidence of a consciousness of guilt", citing People v. Erno, 195 Cal. 272, 232 P. 710. Moreover, testimony showing that a defendant has assumed aliases may be considered as tending to prove that he was endeavoring to conceal his identity after the commission of the crime. People v. Wheaton, 64 Cal.App. 58, 220 P. 451.

Finally, it may be stated that when the prosecution rested its case the defendant offered no evidence, nor did he take the witness stand in his own behalf. As declared by section 13 of article I of the state Constitution, "* * * in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

[7] The contention is made that Mrs. Groves was an accomplice in the commission of the crimes, and that such being the case her testimony has not been sufficiently corroborated to meet the requirements of the law. It is evident, however, that there is no evidence to justify the conclusion that she was an accomplice. As already shown, the jury at the other trial by its verdict of acquittal declared that she was not an accomplice, and there is nothing in the present record to establish that she was. Quite to the contrary, it appears therefrom that she had no reason to suspect that the robbery was to be perpetrated. The contention so made is therefore without merit.

[8, 9] Such being the evidence and the state of the record, we are without legal authority to interfere with the verdict of the jury; for as shown, the evidence is legally sufficient to establish that Stewart was murdered during the perpetration or attempt to perpetrate a robbery, and that the defendant was one of the group who participated in the robbery. True, there is no evidence showing that defendant shot either Stewart or Preston; nor in fact does it show that at the time of the robbery he was armed. It is well established, however, that if a homicide is committed by one of several confederates while engaged in perpetrating the crime of robbery in furtherance of a common purpose, the person or persons engaged with him in the perpetration of the robbery but who did not actually do the killing, are as accountable to the law as though their own hands had intentionally fired the fatal shot or given the fatal blow, and such killing is murder of the first degree. The jury has no option but to return a verdict of murder of the first degree whether the killing was intentionally or accidentally done, and it is proper so to instruct the jury. People v. Perry, 195 Cal. 623, 638, 234 P. 890; People v. Boss, 210 Cal. 245, 290 P. 881; People v. Raber, 168 Cal. 316, 143 P. 317; People v. Lawrence, 143 Cal. 148, 76 P.

893, 68 L.R.A. 193; People v. Olsen, 80 Cal. 122, 22 P. 125; People v. Denman, 179 Cal. 497, 177 P. 461.

[10, 11] And having found the defendant guilty of first degree murder the matter of the penalty was entirely within the discretion of the jury. People v. French, 12 Cal.2d 720, 775, 87 P.2d 1014. The jury was properly instructed as to its power to relieve the defendant from the extreme penalty of the law if in the exercise of its discretion the facts and circumstances so warranted; and since it failed to do so, it is beyond the power of this court to interfere therewith on appeal. People v. Boss, supra.

[12] What has been said in determining the merits of the appeal from the conviction of murder applies with equal force to the conviction on the second count. The additional point urged with respect thereto is that there is no evidence showing an intent to kill. But obviously, in view of the undisputed testimony showing that Preston was beaten on the head with a pistol and shot twice, the jury was justified in finding that the assault was committed with the intent to kill.

The judgments of conviction and the orders denying the motion for new trial are, and each of them is affirmed.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; SPENCE, Justice pro tem.; HOUSER, J.

---

35 Cal.App.2d 597

HOHNEMANN et al. v. PACIFIC GAS & ELECTRIC CO.

Civ. 10809.

District Court of Appeal, First District, Division 1, California.

Nov. 25, 1939.

Rehearing Denied Dec. 23, 1939.

Hearing Denied Jan. 22, 1940.

1. Trial 🔑139(1)

A directed verdict may be granted when, disregarding conflicting evidence and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said there is no evidence of sufficient substantiality to support a verdict in favor of such party, if such verdict had been rendered.

2. Gas 🔑20(4)

Where evidence disclosed that gas meters for apartments were located just inside alley entrance, that gas company's employee experienced difficulty in bringing service into newly occupied apartment, that next morning when an owner entered an unoccupied apartment she lit a cigarette, that an explosion occurred causing her death, and that some one had taken out closed swivel which had been in meter for unoccupied apartment and inserted an open swivel and opened the valve, whether gas company's employee negligently turned on gas through meter connected with unoccupied apartment was for jury.

3. Appeal and error 🔑854(5)

If, regardless of the reasoning of the trial court, a directed verdict may be sustained upon any substantial theory, judgment must be affirmed, but if the facts and inferences do not justify an affirmance, a reversal is necessary.

4. Gas 🔑19

Where evidence showed that contributory negligence was predicated upon theory that decedent had violated an ordinance providing that it should be unlawful to remove or disconnect gas appliance without capping the outlet, even if decedent was responsible for the uncapping unless violation of ordinance was proximate cause of explosion which resulted in her death, it was immaterial, as regards liability of gas company for the explosion.

5. Gas 🔑20(4)

Where evidence disclosed that meters for apartments were located just inside alley entrance, that gas company's employee experienced difficulty in bringing service into newly occupied apartment, that next morning when owner entered unoccupied apartment she lit a cigarette, that an explosion of gas occurred resulting in her death, and that some one had taken out closed swivel from meter for unoccupied apartment and inserted an open swivel and opened the valve, whether gas company's employee failed to take ordinary precaution to ascertain whether he had set in motion the meter connected with the unoccupied apartment, and whether such negligence, if any, was the proximate cause of explosion, were for jury.

6. Negligence ⚷121(2)

The "res ipsa loquitur doctrine" cannot be applied unless the injury is such as would not have occurred except through the negligent construction or improper use of the instrumentality by the party having exclusive control thereof.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

7. Negligence ⚷121(2)

The "res ipsa loquitur doctrine" is not applicable unless the party against whom the rule is invoked has not only accessibility to the facts of the case, but a better opportunity based upon knowledge of surrounding facts of explaining the occurrence.

8. Gas ⚷20(2)

Where evidence disclosed that gas meters for apartments were located just inside alley entrance, that gas company's employee experienced difficulty in bringing service into newly occupied apartment, that next morning when owner entered unoccupied apartment she lit a cigarette, that explosion of gas occurred resulting in her death, that closed swivel had been taken out of meter for unoccupied apartment and open swivel had been inserted and valve opened, that gas pipe in apartment was not capped, that pipe in apartment was in exclusive control of owner, and that meter was exclusively owned and controlled by gas company, res ipsa loquitur doctrine was not applicable to either side.

9. Gas ⚷20(4)

Where evidence disclosed that gas meters for apartments were located just inside alley entrance, that gas company's employee experienced difficulty in bringing service into newly occupied apartment, that next morning when owner entered unoccupied apartment she lit a cigarette, that explosion of gas occurred resulting in her death, that closed swivel had been taken out of meter for unoccupied apartment and open swivel had been inserted and valve opened, and that gas pipe in apartment was uncapped, whether lighting of cigarette in apartment where uncapped gas pipe terminated was contributory negligence was for jury.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Death action by Charlotte M. Hohnemann, by Annie Doud, her guardian, and others, against the Pacific Gas & Electric Company. From a judgment for defendant, plaintiffs appeal.

Reversed.

J. A. Bardin, of Salinas, and Paul C. Dana, of San Francisco, for appellants.

Thomas J. Straub and W. H. Spaulding, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal on behalf of Charlotte M. Hohnemann and William H. Hohnemann, minors, by their guardian Annie Doud, from a judgment rendered in favor of defendant Pacific Gas and Electric Company, a corporation, following the granting of its motion for a directed verdict.

The complaint alleged that the mother of the minors, Charlotte O. Hohnemann, was the owner of certain premises located at 212 Lee avenue in San Francisco; that the defendant company was engaged in the sale, manufacture and distribution of gas to the public generally for domestic and other uses; that for such purpose it maintained a distributing system consisting of mains, pipes and necessary fixtures and appurtenances to control and regulate the flow of gas from its source to points of distribution, including the premises herein referred to; that the supply of gas to this building was so carelessly, negligently and recklessly managed and controlled that it accumulated in and about the premises, as the result of which an explosion of great force and violence occurred, fatally injuring the mother of the minors. The recitals of the complaint are not denied except the allegation of negligence and in this connection defendant alleged "that such supply and distribution of gas was under the direction, management, control and regulation of defendant only to said building, but that defendant lost all direction, management, control and regulation of such gas when the same entered said building, and that said gas upon the entry thereof into said building was solely under the direction, management, control and regulation of the owner of said building, and was purchased by said owner and delivered to said owner at a point outside said building".

The premises, located on the northeast corner of Lee and Holloway avenues in San Francisco, consist of a two-story building containing a series of stores and apartments, which are numbered, beginning with a barber shop directly on the corner, 200 to 214 Lee avenue. A small alley opening on Holloway avenue is used as a tradesmen's entrance and runs along the rear of the premises, paralleling Lee avenue. Just inside the entrance, on the left wall approximately 7½ feet from the ground and directly behind the barber shop, are located the gas meters for the property. From the alley entrance, meters for apartments 204, 212 and 200 are located in a group, a meter for 206 being the fourth and located a little apart from the first three. Meters for 212 and 206 are the only ones to be given particular consideration in this case. These two apartments had been vacant for some time, but the day before the accident new tenants had moved into 206 and about 8 o'clock of that evening an employee of the defendant company arrived to turn on the gas for their use. There is evidence that he placed a ladder underneath the cluster of the first three meters, a short distance away from 206, and, holding a flashlight, started to work; that some difficulty was experienced in bringing the service into apartment 206, but after communicating with its occupants he returned to work at the meter location and finally the gas flow was accomplished. The next morning, when Mrs. Hohnemann entered apartment 212, which she was renovating, she lit a cigarette and an explosion of gas occurred resulting in her death.

Evidence was presented from which an inference might arise that the pipe within apartment 212 was uncapped at the time of the explosion. The evidence also revealed that someone had taken out the closed swivel which had been in the 212 meter from the time the last tenant moved out, inserted on open swivel, and opened the valve. It was respondent's contention that the new tenant in 206 had been down in the alleyway working around the gas meters the afternoon before the explosion. Appellants contend that defendant's employee was responsible for the flow of gas through the meter into apartment 212. The tenant and the employee each denied responsibility.

[1, 2] The cause of the accident might have been either the removal of the closed swivel and the insertion of the open one in the meter, and the opening of the valve into the pipes connecting with 212, or the fact that the pipe in the apartment had been left uncapped. Likewise the cause of the explosion might have been traceable to both alleged negligent acts. In Walters v. Bank of America, etc., Assn., 9 Cal.2d 46, 49, 69 P.2d 839, 840, 110 A.L.R. 1259, the court said: "A directed verdict may be granted, when, disregarding conflicting evidence, and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said that there is no evidence of sufficient substantiality to support a verdict in favor of such party, if such a verdict had been rendered. Estate of Flood, 217 Cal. 763, 21 P.(2d) 579; Parker v. James Granger, Inc., 4 Cal.(2d) 668, 52 P.(2d) 226." The vital issue might have been determined favorably to plaintiffs' theory; that is, an inference might have been fairly and reasonably deduced from the circumstantial evidence that the employee ascended the ladder and negligently turned on the gas through the meter connected with apartment 212, and that this negligence standing alone was the cause of the accident. Sawyer v. Southern California Gas Co., 206 Cal. 366, 274 P. 544; Chutuk v. Southern California Gas Co., 218 Cal. 395, 23 P.2d 285; Hilson v. Pacific Gas & Elec. Co., 131 Cal.App. 427, 21 P.2d 662. In Oklahoma Natural Gas Company v. Jopling, 121 Okl. 10, 247 P. 69, 72, the court said: "In our opinion, where there is more than one theory as to the cause of gas passing through a certain channel and the different theories are supported by circumstantial evidence, the jury may then adopt such theory as in their judgment is more plausible, provided the same is reasonably supported by the evidence."

[3] The order for the directed verdict was based specifically on the trial court's conclusion that no negligence on the part of the defendant had been proven. The court said: "So, in anything that I have to say here, I am not passing upon any question of the contributory negligence alleged on behalf of Mrs. Hohnemann." If, regardless of the reasoning of the trial court, the directed verdict may be sustained upon any substantial theory, the judgment must be affirmed (Rapp v. Southern Service Co., 116 Cal.App. 699, 4 P.2d 195; Davey v. Southern Pacific Co., 116 Cal. 325,

48 P. 117); conversely, if the facts and inferences, as contended by appellants in the present case, do not justify an affirmance, a reversal is necessary. Hence we find it necessary to examine and pass upon the theory of the alleged contributory negligence of the deceased, and the evidence tending to uphold defendant's contention in that regard.

Respondent contends that the owner, Mrs. Hohnemann, violated the gas appliance ordinance by leaving the gas pipe in the apartment uncapped, and that the accident was due to her contributory negligence in this respect; also, that the lighting of a cigarette in an apartment containing an uncapped gas pipe was contributory negligence, and that the directed verdict was justifiable on proof of either or both of these facts. We express no opinion on the merits as to whether the above constituted contributory negligence.

[4, 5] In a case such as here presented, wherein the defendant alleges contributory negligence, and the evidence shows that such contributory negligence was predicated upon the theory that decedent had violated an ordinance providing that it shall be unlawful to remove or disconnect any gas fixture or gas appliance without capping or plugging with a screwed joint fitting the outlet from which said fixture or gas appliance was removed, even assuming the evidence showed that decedent was responsible for the uncapping, unless the violation of the ordinance was the proximate cause of the explosion which resulted in the death of Mrs. Hohnemann, it was immaterial. In other words, the causal connection between the violation of the law, if any, and the injury, must appear. Baillargeon v. Myers, 180 Cal. 504, 507, 182 P. 37; Anderson v. I. M. Jameson Corp., 7 Cal.2d 60, 59 P.2d 962. The jury might have found that the defendant corporation's employee failed to take ordinary precaution to ascertain whether he had set in motion the meter connected with the unoccupied apartment 212 and as to whether there was an uncapped pipe. Such negligence of defendant's representative may have been the proximate cause of the explosion and if the jury should so find, the violation of the ordinance by decedent would be immaterial.

The appeal herein presents the novel anomaly of both litigants claiming the doctrine of res ipsa loquitur to be applicable in determining the quantum of evidence necessary to maintain their respective positions. Plaintiffs contend that the meter was owned and under the exclusive management and control of the defendant, and that the accident was such as in the ordinary course of things does not occur if those in charge use proper care. Defendant's claim is that the pipe from which the gas escaped was inside the closed apartment and that decedent had the sole and exclusive control of the pipe; that therefore the burden of proof is upon plaintiffs to explain the uncapped condition of the pipe and the leak of gas therefrom. Neither contention is sound.

[6] The rule of res ipsa loquitur, embodied in the phrase "the thing speaks for itself," has been held at times to include within its indefinite scope the modern use of vehicles, machines, articles of different kinds and even livestock when the owner, operator or person in control, or party responsible for the maintenance or management of the instrumentality, is, by reason of his accessibility, in a position to give an explanation of the occurrence of the accident. On account of fast changing phases of modern life, no precise rule may be stated to cover this doctrine except to say that the injury must be such as would not have occurred except through the negligent construction or improper use of the instrumentality by the party having exclusive control thereof.

Regardless of its enlarged scope, we still fail to agree with defendant that the maxim of res ipsa loquitur may be invoked by a defendant against a plaintiff under the issues and facts of this case. No authority upholding such theory has been suggested. A plaintiff called upon under the maxim of res ipsa loquitur to explain the cause of an injury, would be doing only that which is now required, namely, proving, by a preponderance of evidence, the affirmative allegations of the complaint.

[7, 8] Conceding for the sake of discussion, but not deciding, that under certain facts not involved in this case the maxim of res ipsa loquitur may be invoked by each side, the instrumentality causing the injury must be under the exclusive control of the party against whom the rule is invoked. In this case the meter was exclusively owned and controlled by defendant corporation; the pipe and cap thereon exclusively by the decedent. In other words, neither the decedent nor the defendant had control of both the swivel connection of the

meter and the pipe and cap thereon in the apartment. The doctrine of res ipsa loquitur is not applicable unless the party against whom the rule is invoked has not only accessibility to the facts of the case but a better opportunity, based upon knowledge of surrounding facts, of explaining the occurrence. Scellars v. Universal Service, 68 Cal.App. 252, 228 P. 879. Under the facts of this case the rule was not applicable to either side. The difference between the case of Chutuk v. Southern California Gas Co., supra, relied upon by respondent on this point, and the present one is that in the Chutuk case the defendant gas company, irrespective of the location either on or off of plaintiffs' property, of the gas pipe and riser causing the injury, retained complete charge and control of such instrumentality. In this case the instrumentality was under the control of decedent or defendant, but not of both.

[9] Whether or not the lighting of a cigarette in an apartment where an uncapped gas pipe terminated was contributory negligence under the allegations of the answer, was a question of fact to be determined by the jury; and since the evidence presented issues of fact of sufficient substantiality to raise an inference of negligence, the determination of the cause should have been submitted to the jury.

The judgment is reversed.

We concur: PETERS, P.J.; KNIGHT, J.

PEOPLE v. LONG.

Cr. 1992.

District Court of Appeal, First District, Division 1, California.

Nov. 29, 1939.

Rehearing Denied Dec. 14, 1939.

See 96 P.2d 1021.

1. Homicide 🔑18(2), 74

A fatal abortion, to constitute murder, must be one that is not necessary to preserve the life of the woman aborted, while to constitute manslaughter it must be a lawful abortion but one performed without due caution and circumspection. Pen.Code, §§ 192, 274.

2. Homicide 🔑241, 254

In murder prosecution, evidence was sufficient to have sustained finding that abortion was not rendered necessary to preserve life because of diseased heart condition of aborted woman, and that resulting death was murder in the second degree. Pen.Code, § 274.

3. Homicide 🔑309(6)

Where main theory of prosecution is that death resulted from an illegal abortion, but some substantial evidence of want of due caution and circumspection is offered and received, an instruction on manslaughter may properly be given. Pen.Code, §§ 192, 274.

4. Criminal law 🔑1137(1)

Where, after considerable argument, trial judge informed accused and counsel that both murder and manslaughter were involved in abortion charge, no claim of surprise or of being misled could be made on appeal. Pen.Code, §§ 192, 274.

5. Homicide 🔑236(1)

In murder prosecution, evidence showing lack of due caution and circumspection in producing abortion was sufficient to sustain conviction of manslaughter. Pen.Code, § 192.

6. Criminal law 🔑822(16)

In murder prosecution, an instruction, that jury should find accused not guilty if they found from the evidence beyond a reasonable doubt that accused performed abortion with due caution and circumspection and that operation was necessary to preserve life of victim, was prejudicially erroneous because requiring jury to find that accused had established his defense beyond a reasonable doubt, notwithstanding that latter portion of instruction correctly stated that they should find accused guilty if they believed beyond a reasonable doubt that lack of due caution and circumspection were proved. Pen.Code, § 192.

7. Criminal law 🔑494

In murder prosecution, instruction that jury could regard expert testimony as merely advisory should not have been given in view of fact that an issue of lack of due caution and circumspection in performing abortion was presented and that, in the nature of things, the presence or absence thereof

could be largely proved or disproved only by expert testimony. Pen.Code. § 1127b.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Claude C. Long was convicted of manslaughter, and he appeals.

Reversed, and cause remanded for new trial.

Edward A. Cunha and John J. Taaffe, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Appellant Dr. Claude C. Long, his wife, and one Ann Fisher, were charged with the murder of Genevieve Arganbright. Admittedly the death occurred while Dr. Long was performing an abortion upon the deceased. The jury acquitted Mrs. Long and Ann Fisher, but found Dr. Long guilty of manslaughter. From the order denying his motion for a new trial and from the judgment of conviction this appeal has been taken.

Appellant urges three main contentions on this appeal:

1. That the evidence is insufficient to show either murder or manslaughter; that the cause was tried solely on the theory that the death resulted from an illegal abortion; that there is no evidence to show that the operation was performed without due caution and circumspection; that under such circumstances it was error to instruct on manslaughter; that the conviction for manslaughter constituted an implied acquittal on the murder charge, and constituted a determination that the operation was lawful; that the manslaughter verdict, based on the theory of a lawful operation performed without due caution and circumspection, is totally unsupported by the evidence.

2. That the trial court erred in the giving of several instructions.

3. That the trial court committed error in denying the motion for a new trial on the ground of newly discovered evidence and misconduct of the jury. In view of our conclusion that the cause must be reversed on the ground of misdirection of the jury, the third allegation of error need not be discussed. The first allegation of error must be discussed for the guidance of the trial court on the new trial.

The evidence shows that Dr. Long, a duly licensed physician, maintained two offices—one on Valencia street and one on Haight street, both in San Francisco. The Valencia street office was in the middle flat of the building, had the doctor's name on the window, and his telephone was listed in the directory. The defendant Fisher, who is related to the Longs, was in charge of this office. When visited by the police, after the homicide, no medical or surgical equipment of any kind was found in this flat. Dr. Long testified that he seldom saw any patients at this office; that patients called there, or telephoned, and that Mrs. Fisher made appointments for them. The evidence also shows that in the flat above the offices occupied by Long on Valencia street there lived a Mrs. Spence, who was married to Mrs. Long's brother. She testified that defendant Fisher resided at the rear of the offices, and that in the time that she had been living there she had never seen Dr. Long on the premises.

Doctor Long admittedly used the Haight street premises for seeing and treating his patients. These premises had been rented by Mrs. Long under the name of Young. A telephone was located at these premises under the name of Young, but at the request of the Longs the number was not listed in the telephone directory. The appellant frequently parked his automobile in a garage about seven blocks from the Haight street flat. On occasion the garageman accompanied Long to within a half block of the flat, where Long would get out of the car and the garageman would return the automobile to the garage. When arrested Long had in his possession keys to the back doors of these premises, but none fitted the front door. When visited by the police after the homicide, an operating table and accessories, and various medicines used in connection with operations on women were found in the flat. Some instruments used in performing abortions were found in a closet, but the actual instruments used by the appellant in performing the abortion on Mrs. Arganbright were admittedly removed by him the night she died and turned over to the police later at the time of his arrest.

The husband of the deceased testified that his wife was two and one-half months pregnant, was apparently in good health, and that she possessed none of the visual symptoms of a bad heart. He further stated she was athletic and took long hikes, danced, liked to swim and play tennis, and, although she worked for the W.P.A. during the day, performed the usual household tasks. On May 19, 1937, the deceased, in the presence of her husband, telephoned to Dr. Long's Valencia street office and asked the woman who answered the phone for an appointment. She was told to call at that office between two and four o'clock. Mr. and Mrs. Arganbright called that afternoon at the Valencia street office, where they were admitted by defendant Fisher. In the presence of the husband Fisher asked the deceased her name, and questioned her concerning the identity of her companion. The husband was placed in one room and the deceased and Fisher went into another. The husband overheard Fisher ask the deceased how long she had been pregnant, and also heard Fisher tell his wife not to bring her husband along when she returned the next night.

The next day, May 20, 1937, Mrs. Arganbright went to work and returned home at the usual hour. She left home at about quarter to seven in the evening, telling her husband she was going to have an abortion performed by Dr. Long; that she was going by street car to the Valencia street office, where she was to be taken by a chauffeur to some place on Haight street. When she left her home she had with her $50 which she had borrowed, which sum Fisher had told her the day before was necessary for the operation.

Late in the evening of May 20, 1937, Mrs. Arganbright died at the Haight street premises while the appellant was performing an abortion upon her.

So far as the prosecution's case is concerned, chronologically, the next pertinent testimony was given by Dr. Goldsand. He testified that between 10:20 and 10:30 p.m. he received a telephone call from defendant Fisher; that she asked him to come immediately to the Haight street premises to see a very sick patient; that he arrived in eight or ten minutes; that Fisher admitted him and told him to hurry up the stairs; that he was ushered into a bedroom where he saw Dr. and Mrs. Long and the deceased, who was lying on a bed, attired in her street clothes, her lower extremities being covered with a blanket. The appellant asked Dr. Goldsand to examine the patient. Upon such examination Dr. Goldsand ascertained that Mrs. Arganbright was dead. He administered ephedrin sulphate, but it did not revive the patient. He then told Dr. Long the woman was dead. He testified that Long then asked him to sign the death certificate, but he refused, informing Long that because he was the physician who had attended the deceased during her lifetime, it was his, Long's, duty to sign the death certificate. Long, he stated, remained silent, whereupon he, Goldsand, left the premises. Dr. Long testified that he understood Dr. Goldsand to state he would sign the certificate. This conflict, in view of the conviction, must be resolved in favor of the prosecution.

The next link in the prosecution's chain of evidence was furnished by an employee of an undertaking establishment in San Francisco. He testified that he and a fellow employee went to the Haight street flat to get a body in response to a telephone call; that he arrived at about 2:30 a.m. of the morning of May 21st; that he met Mrs. Long and Ann Fisher there; that Dr. Long was not there; that he was informed by the two women that they were not members of the deceased's family but were "very dear friends"; that the relatives had left and would complete arrangements with the undertaking parlor in the morning; that Dr. Goldsand had been the attending physician and that he had been in attendance for at least half an hour before she passed away; that the deceased had died from a heart attack. In response to an inquiry as to whether there was a telephone in the flat from which he could phone Dr. Goldsand for verification he was told that there was no telephone; that Dr. Goldsand had stated everything was in order and that he would sign the death certificate in the morning. The next morning the body was embalmed, and in the afternoon, when no relatives had called or death certificate had been signed, the matter was referred to the coroner. Both Dr. Goldsand and the employees of the undertaking establishment testified as to the physical appearance of the body. The conditions testified to were consistent with the defense's theory that the deceased had died from heart failure.

On the morning of May 21st the appellant and his wife registered at the Chancellor Hotel in San Francisco under the false and assumed names of Mr. and Mrs. C. Young of Sonora, California. At the time they registered they were informed that all rooms had been engaged for that night and that they must give up their room by 4 p. m. They left the Chancellor Hotel before 4 p. m. and went to the Cecil Hotel where they again registered under false and assumed names.

Late in the afternoon of May 21st the husband of deceased telephoned the Valencia street office of appellant. Defendant Fisher answered the telephone, and told him that she knew nothing of his wife's whereabouts, and that Dr. Long was out of town. Later the police arrived, and he then discovered his wife was dead.

Dr. and Mrs. Long were arrested at the Cecil Hotel on May 22d. At that time, after telephoning to their attorney, they had changed their registration and were registered under their proper names. Defendant Fisher left San Francisco and was located several weeks later in Nevada City.

On the trial neither Mrs. Long nor Ann Fisher took the witness stand. Appellant Long did take the stand in his own behalf, and testified in detail concerning the facts and circumstances surrounding the death.

[1] It was the main theory of the prosecution that Genevieve Arganbright had died as the result of an illegal abortion; that the abortion was not necessary to preserve her life; that she died as a result of surgical shock and from hemorrhage caused by the abortion; that she did not die as a result of a heart condition. However, although this was the main theory of the prosecution, it was not the only theory. As will later appear in detail, the prosecution from the very first of the trial refused to limit itself to this theory, and offered testimony that the death resulted from an abortion performed without due caution and circumspection. This distinction becomes important because, so far as this case is concerned to constitute murder, an abortion must be an illegal abortion—that is, one not necessary to preserve the life of the woman aborted (sec. 274, Pen.Code), while to constitute manslaughter, an abortion must be a lawful abortion, performed "without due caution and circumspection". Sec. 192, Pen.Code. The main theory of the defense was that the operation was necessary to preserve the life of the deceased; that the deceased had an ailing heart resulting from a mitral stenosis; that this heart might decompensate at any time; that this heart could not stand the burdens of full pregnancy and of childbirth; that the interruption of the pregnancy was necessary to preserve her life; that the operation was performed with due caution and circumspection; that Mrs. Arganbright died from the heart condition.

[2] There can be no doubt that the deceased was suffering from a heart affected with a mitral stenosis—that is, the mitral valve of the heart had become infected and had become calcified so as to reduce the diameter of the orifice of the valve. The medical witnesses testified that this condition as it progresses results in the blood's passing through the valve with increased difficulty. As a result, the heart must pump harder and faster, and to do this becomes enlarged. The heart becomes decompensated when it is unable to meet the increased load. When this condition occurs, death ensues. They also testified that there are various visual symptoms of a decompensating heart, such as shortness of breath and discoloration. One of the main questions involved at the trial was whether the heart condition of deceased had progressed sufficiently so that the added burdens of pregnancy and childbirth might cause the heart to decompensate.

In support of his defense Dr. Long testified that the deceased first visited him in March of 1937, that he had then examined her and found she had a mitral stenosis; that her heart was a border-line heart; that the compensation was fairly good, but decompensation might occur at any time; that he was not sure at that time she was pregnant; that he formed the opinion at that time that if she were pregnant an abortion was necessary to preserve her life; that he told her to return in two weeks; that he did not see her again until the night of her death. The appellant produced no office record of this visit, but contended that such a record had been made, but that he had been unable to find any such record after the police had visited the premises. We are of the opinion that the jury might well have disbelieved all of this testimony concerning the March visit. The jury might well have believed from the testimony of the husband concerning the facts surrounding the telephone conversation and the visit to Dr. Long's office of May 19th, that this was the first visit of the wife to Dr. Long's office.

The appellant further testified that on the evening of May 20th when decedent returned, she explained that she was definitely sure that she was pregnant; that she suffered from a constant tired feeling, from precordial pain and shortness of breath, and that she had a definite palpitation of the heart—all definite indications of a diseased heart. He also testified that he again examined the heart and found the murmurs and thrill which indicated a definite mitral stenosis; that he thereupon concluded that a therapeutic abortion was necessary to preserve her life; that he told the deceased of this conclusion; that she consented to the abortion. Again it is proper to stop and comment on this testimony. We think from all the surrounding circumstances that the jury might well have concluded that this testimony to the effect that he had examined the heart of the deceased and discovered the mitral stenosis was false. The method used by the defendant in his business; his actions in attempting to get Dr. Goldsand to sign the death certificate; his attempt at flight and concealment; his failure to notify the husband of the deceased; his failure to sign a death certificate—all lead to but one inference, and that is that appellant thought he had performed an illegal operation and that the deceased had died as a result thereof. His actions all demonstrate a consciousness of guilt. However, the mere fact that appellant may have believed or intended to commit an illegal abortion, if in fact it was a legal abortion to preserve life, probably would not make the resulting homicide murder. We may assume, for the purposes of this opinion, that, even though the jury could have found that appellant did not know of the existing heart condition, if, in fact the heart condition was such that an abortion was necessary to attempt to preserve her life, this would be a complete defense to the murder charge.

Dr. Long then testified as to the method used in performing the operation and as to what then happened. He testified that while performing the operation the patient's heart failed and that he was unable to revive her. The balance of his testimony in which he attempted to explain the reasons for his method of conducting his business; his assuming a false name; his failure to sign the death certificate; his attempt at concealment; etc., need not be here commented on. The jury might well have believed, and apparently did so believe, that such testimony was false.

As already indicated, it is appellant's main contention that the evidence without conflict established that the heart condition was such that an operation was necessary to attempt to preserve the life of deceased; that she died from the heart condition; that there is no evidence to sustain either a murder or manslaughter verdict; that in any event he was acquitted of the murder charge and convicted only of manslaughter; that to sustain the manslaughter conviction there must be evidence of lack of due caution and circumspection in the performance of the operation; that there is no such evidence in the record.

There is no need to review at length the evidence that demonstrates that, had the appellant been convicted of murder, the record would sustain such a conviction. All of the witnesses for both prosecution and defense agreed that the deceased had a mitral stenosis, but there was a sharp conflict as to whether the mitral stenosis had progressed to the point where an abortion would have been necessary, and there was a sharp conflict as to the cause of death. The autopsy surgeon and the pathologist in the coroner's office both testified that the condition of a heart during life could be ascertained from a gross or from a microscopic examination after death; that they had made such an examination; that this heart was not enlarged; that it was not decompensating prior to death but was functioning properly; that the heart condition was an old one and was not progressing; that the heart was in such a condition that the deceased could have gone through a normal labor. The pathologist, Dr. Carr, and several other doctors testified positively that the operation was not necessary to preserve the life of the deceased. Dr. Carr and Dr. Leland testified that deceased did not die from the heart disease but died from the abortion—from surgical shock and hemorrhage caused by the abortion. The husband of the deceased, members of her family and several of her co-workers testified that deceased possessed none of the visual symptoms that would tend to indicate a dangerous condition of the heart. There was a clear conflict in the evidence as to whether the deceased was in danger from the heart condition, and whether the heart condition caused death. The evidence also showed that in 1932 the deceased gave birth to a child at St. Mary's hospital. The records of that hospital, and the testimony of the doctors there in charge, showed that, although the deceased then had a mitral stenosis, she had a normal labor and delivery; that the heart doctor had then determined that the patient had a well compensated mitral stenosis, which means that the heart was then taking care of itself and there was no sign of decompensation. The doctors then in attendance testified that if her heart was the same in 1937 as in 1932 an abortion was not necessary; that most doctors require some evidence of decompensation before they will abort. They conceded, however, that some doctors advocate an abortion in all cases of mitral stenosis. This was denied by several prosecution witnesses. Several of the doctors testified that correct medical practice would require sending a patient suffering from mitral stenosis to a heart specialist for treatment.

It is true that there was considerable expert testimony offered by appellant in addition to his own testimony to the effect that an abortion was reasonably required in the instant case. After laying the proper foundation, portions of various medical books were read into evidence, their general tenor being that some doctors recommend abortions in all cases of mitral stenosis. It also appeared that in November, 1933, deceased visited the Mt. Zion Hospital Clinic. At that time she apparently believed that she was pregnant. Her symptoms were then such that, coupled with the doctors' clinical examination then made of her heart, they testified that, had she been then pregnant, they would have recommended an abortion. It was later discovered she was not then pregnant, so that no abortion was required.

This review of the record demonstrates that there was sufficient evidence upon which the jury could have found the abortion was not necessary to preserve life, and, therefore, illegal, and that the resulting death was murder in the second degree.

Appellant contends that even if it be admitted that the evidence was conflicting on whether the abortion was necessary to preserve life, that by the conviction of manslaughter he was acquitted of murder, and therefore the jury determined this conflict in his favor—that is, determined that the abortion was necessary to preserve life. Based on this premise it is next urged that there is no evidence at all of lack of due caution and circumspection in the performance of the operation, and, therefore, there is no evidentiary support for the verdict of manslaughter. The same contention is also made in a slightly different form—that is, that it was error for the trial court to instruct on manslaughter for the reason that there was no evidence to support such a verdict. In support of these contentions, the appellant mainly relies on People v. Huntington, 138 Cal. 261, 70 P. 284, 285. In that case, which was a prosecution for a homicide growing out of an abortion, the prosecution's only theory was that the abortion was illegal and that the offense, if any, was murder, and, apparently, offered evidence only on this issue. The trial court instructed on, and the defendant was convicted of, manslaughter. This conviction the Supreme Court reversed. The court emphasized that: "The statements of the district attorney, and the whole course of the trial, show that the case was tried upon the sole theory that appellant, who is a physician, caused the death of the deceased by attempting to commit a felony, to wit, an abortion." The court recognized that, generally speaking, under an indictment for murder the defendant may be convicted of manslaughter, but held that that rule does not apply when the theory and evidence does not justify a manslaughter verdict. The court held it error to have thus injected manslaughter into the case, and further held that it was error, in view of the record there presented, having instructed on manslaughter, not to have further instructed on the degree of care required to show lack of due caution and circumspection, and that this was not cured by lack of request by appellant of an instruction on that point. The cause was remanded for a new trial. The district attorney then attempted to retry the defendant for murder, apparently on the theory that on this trial he could prove murder, but could only secure a manslaughter conviction on the murder evidence. In Huntington v. Superior Court, 5 Cal.App. 288, 90 P. 141, it was held that the original conviction of manslaughter constituted an acquittal of murder, and that he could not again be tried for murder. The defendant was then tried for manslaughter and was convicted. In People v. Huntington, 8 Cal. App. 612, 97 P. 760, his conviction was affirmed. On this last trial, the court instructed the jury that if they believed that the evidence showed murder they could convict of manslaughter. There can be no doubt that there is language in each of these three cases inconsistent with language found in the other two. The courts, in more recent cases have attempted, rather unsuccessfully, to reconcile these conflicts. There have been several abortion cases holding that a manslaughter instruction is properly refused where there is no evidence of want of due care. People v. Balkwell, 143 Cal. 259, 76 P. 1017; People v. Northcott, 45 Cal.App. 706, 189 P. 704; People v. Hickok, 28 Cal.App.2d 574, 83 P.2d 39; see, also, People v. Wright, 167 Cal. 1, 138 P. 349. In People v. Kelley, 24 Cal.App. 54, 140 P. 302, the theory of the first Huntington case was reaffirmed, and a conviction of manslaughter, based on murder evidence in a nonabortion case, reversed.

[3] The respondent, in support of the contention that it is not reversible error to instruct on manslaughter, even in the absence of evidence of lack of due caution and circumspection, mainly relies on several nonabortion cases where the Huntington cases have been somewhat critically discussed. People v. Wolcott, 137 Cal.App. 355, 30 P.2d 601; People v. Warr, 22 Cal.App. 663, 136 P. 304. He also relies on the general rule, frequently stated by the courts, that manslaughter is an offense included within murder, and that a manslaughter verdict based on murder evidence will be upheld because the error in instructing on manslaughter, if any, is favorable to defendant and, therefore, he cannot complain. People v. Muhlner, 115 Cal. 303, 47 P. 128; People v. Shimonaka, 16 Cal.App. 117, 116 P. 327; People v. Roselle, 20 Cal.App. 420, 129 P. 477; People v. Tugwell, 32 Cal. App. 520, 163 P. 508. We do not find it necessary to pass on this contention. Whatever may be the rule in cases where the defendant is tried solely on the theory that death resulted from an illegal abortion, and no evidence is offered of lack of due caution and circumspection, there can be no doubt that where the main theory of the prosecution is that death resulted from an illegal abortion, but some substantial evidence of want of due caution and circumspection is offered and received, an instruction on manslaughter may properly be given. This problem was involved and fully discussed in People v. Wright, 167 Cal. 1, 138 P. 349, and in People v. Mount, 93 Cal.App. 81, 269 P. 177. In the first case the trial judge instructed on both murder and manslaughter. The jury convicted of murder, and on appeal it was held not to have been error to instruct on manslaughter, there being some evidence of lack of due caution and circumspection. In the second case, on similar instructions, the jury convicted of manslaughter. This was affirmed on appeal, on the ground that there was evidence of negligent performance of the operation.

In our opinion, the present case falls within the rule of these last two cited cases. For that reason we do not have to decide now whether in a case where no evidence of lack of due caution and circumspection is offered and received, a manslaughter verdict can be supported solely on murder evidence, or whether, in such a case, it is reversible error to instruct on manslaughter.

[4] It is true that the respondent seeks to support the verdict solely on the theory above discussed that murder evidence may support a manslaughter verdict, and that no contention is made that there is any evidence that the appellant was guilty of lack of due caution and circumspection in the performance of the operation—in fact, in discussing another point, at page 48 of the brief of the attorney general it is stated: "in this case the question of malpractice was not in issue; nor was there in this case any question presented during the trial concerning the performance of the operation without due caution and circumspection". This concedes entirely too much. A reading of the record demonstrates two things—first, that from the very first of the trial the prosecuting attorney refused to limit himself to the theory of murder; and second, that there is substantial evidence from which the jury might well have inferred that appellant did not use due caution and circumspection in the performance of the operation, and that the death resulted therefrom. In his opening statement to the jury the prosecuting attorney referred to the fact that he would prove, among other things, that the cervix of deceased was "torn, dilated and mutilated". Before a witness was sworn, the attorney for defendant demanded to know whether one of the theories of the prosecution was to be lack of due care on the part of Dr. Long. The court refused to compel the prosecutor to definitely state, pointing out to counsel that they could not now complain of surprise because they were being warned in advance that they would be expected to defend against that theory.

Finally, after considerable argument, the trial judge informed defendant and his counsel that both murder and manslaughter were involved in the charge. No claim of surprise or being misled can now be made.

[5] Now as to the evidence. As already indicated, the main theory of the prosecution was that death resulted from an illegal abortion, and the major portion of the evidence introduced was introduced on this theory. However, all of the medical witnesses for the prosecution were asked questions and were cross-examined on points relating to the charge of lack of due caution and circumspection.

Dr. Carr, pathologist to the coroner's office, testified that one of the causes of death was shock and hemorrhage following an interrupted pregnancy; that the mitral stenosis had existed since childhood and was not progessive; that the cervix shows a lateral laceration on either side, meaning "that the cervix has been manually torn by an instrument"; that "the cervix had been actually torn from the opening to the uterus and blood had run from these areas into the tissue adjacent to the tear"; that "part of the placenta that was nourishing this baby had actually been pulled out through the cervix into the vagina"; that "apparently an attempt had been made to enter her cervical canal, and by some false jabbing the upper vaginal reflection had actually been torn"; that a proper therapeutic abortion is performed in a hospital; that in a proper operation the uterus is dilated slowly with progessive dilators; that progressive dilators will not tear the cervix; that the tears here present indicate progressive dilators were not used. Dr. Long admitted using a type of dilator which Dr. Carr testified was not the proper or approved type. Dr. Carr also testified that, according to approved practice, a therapeutic abortion is performed in a hospital because, among other things, an oxygen tank and carbon dioxide are available for emergencies. These emergency facilities were not present at the Haight street flat of appellant. Dr. Carr also testified that the tearing and mutilation and puncturing of the cervix, described by him, is a painful and shocking procedure, and would produce shock in the entire body, and that deceased died from shock; that it is the usual custom and practice of doctors to give a general anesthesia when performing an abortion, for the reason that this reduces shock; that with "the mutilation and the perforation one sees here, a rather deep anesthesia would be required to reduce the pain". Dr. Long testified he did not use a general anesthesia. There was other medical testimony that if a person possessed the symptoms of a decompensating heart testified to by Dr. Long, that approved practice, before performing the abortion, would be to send the patient to a heart specialist and to hospitalize her for some time to build up her heart so it could stand the abortion; that the type of local anesthetic used by appellant would not render the patient immune from pain.

Other testimony could be referred to from which the jury could have inferred that appellant did not exercise that care and circumspection required in such cases. The testimony recited is sufficient to support the manslaughter verdict.

[6] The next contention of appellant is that the trial court committed error in the giving of certain instructions. With this contention we agree.

On the question of reasonable doubt the trial court instructed the jury as follows:

"If you find from the evidence beyond a reasonable doubt that the defendant Claude C. Long performed or attempted to perform an operation upon the person of the deceased for the purpose of delivering an unborn child *and that the operation or attempted operation was performed with due caution and circumspection,* and if you believe from all the evidence that the operation was necessary to preserve the life of the decedent and that death resulted from such operation, *you shall nevertheless find the defendant not guilty;* but, on the other hand, if you believe beyond a reasonable doubt that due caution and circumspection were not exercised, and if you believe that the operation was not necessary to preserve the life of Genevieve Arganbright and that death resulted from such operation, then it is your duty to bring in a verdict of guilty." (Italics ours.)

The first part of this instruction was highly misleading. The jury was there told that they should find the appellant *not* guilty if they found "from the evidence beyond a reasonable doubt" that Long performed the operation "with due caution and circumspection", and that the operation "was necessary to preserve the life of the decedent". The necessary inference is that before they could acquit, the jury must find that appellant had established his defense beyond a reasonable doubt. The verdict of guilty of manslaughter implies that the jury found that the operation was performed without due caution and circumspection. On this issue the evidence of the prosecution was sufficient, as pointed out above, to sustain the verdict, but it was not by any means uncontradicted. There is substantial evidence, not only of appellant himself, but of several of his medical witnesses, that due caution and circumspection were employed, and at least one medical prosecution witness, Dr. Leland, testified that his physical examination after death disclosed no lack of skilfullness in the performance of the operation. Medical witnesses testified that, although they would always perform such an operation in a hospital, it was in fact a minor operation, and could easily be performed in an office; that the reason for going to a hospital was to protect themselves against a criminal charge of unlawfully performing an abortion. The method and the instruments used by Long were approved by several competent and qualified doctors. Under such circumstances, to instruct the jury that to acquit, the use of due caution and circumspection should be proved beyond a reasonable doubt, was error of a most prejudicial nature. It was not cured by the last portion of the instruction which correctly states that they should find defendant guilty if they believed beyond a reasonable doubt that lack of due caution and circumspection were proved, nor was it cured by the other general instructions on the presumption of innocence and instructions to the effect that the defendant's guilt must be shown beyond a reasonable doubt. The two statements of the law contained in the challenged instruction were highly misleading, and the first part of the instruction is in conflict with other instructions. While proper instructions told the jury that they should not convict unless guilt was shown beyond a reasonable doubt, on the specific issue of whether due caution and circumspection were used, the jury was told that they should acquit if they believed beyond a reasonable doubt that due caution and circumspection were used.

It is no answer to state, as does the respondent, that the instruction is correct as far as it goes, but that it does not go far enough—that is, it is correct in stating that under the circumstances set forth in the challenged instruction the jury should acquit, but that it is faulty only in that it "does not give the appellant the benefit of a lesser degree of proof to which he is entitled, to-wit, that there must also be a verdict of not guilty of manslaughter if the evidence merely created a reasonable doubt as to the matters which the prosecution must prove", and that this deficiency was corrected by the other instructions above mentioned. The only reasonable and fair interpretation that can be placed on the challenged instruction is that the jury was told, not in general language but in specific language, that on the only issue involved on the manslaughter charge, to acquit, they must find due caution and circumspection beyond a reasonable doubt, and the obvious inference is that the burden is on the defendant to show this. In a case such as this, where, so far as manslaughter is concerned, the basic issue was the use or lack of due caution and circumspection, and where the burden on that issue is obviously on the people, and where the evidence on the issue was highly conflicting, to give the jury the challenged instruction, obviously was prejudicial and constitutes reversible error.

That the jury was confused by the instruction is indicated by what happened after they were first instructed. Some six hours after the jury retired to deliberate, they returned to the court room. The foreman stated that the jury desired those instructions dealing with whether or not the abortion "was legal or illegal" to be read to them. Another juror stated that was not what he wanted, he "wanted for you to read all the instructions that had to do with towards the latter part of your instructions, when you said if you find that an abortion was committed in order to save the life of the deceased, then you vote not guilty * * *." Another juror stated: "There was just a dispute about that". When the judge suggested it might be better to read the instructions in the morning, a juror stated that they had better be read that night; that "not only for my own sake but I feel that for everybody's benefit it would be a help to have them and be able to answer these questions honestly". The judge then read three instructions. The first and third instructions dealt with only the murder phase of the case. In them the jury was told that before they could find the defendant guilty they must find beyond a reasonable doubt that the operation was not necessary to preserve life. The second instruction then read to the jury was the instruction now challenged. This was the only instruction then read to the jury dealing with manslaughter, and in it they were told to acquit the defendant if they found beyond a reasonable doubt that defendant exercised due caution and circumspection. When the trial judge had finished reading the instructions, the jurors stated, in response to an inquiry of the court, that "Yes, yes, those are just the ones". The judge then asked the jury if they desired the instructions to be reread to them, and, upon receiving an affirmative answer, reread these three instructions. Under such circumstances it must be held that the giving of such a conflicting, confusing, contradictory, misleading and erroneous instruction on such a vital issue constituted reversible error.

[7] Appellant also complains of an instruction on the weight to be given to expert testimony, pointing out that since his defense was almost entirely predicated on expert testimony, such instruction was highly prejudicial. After properly giving, practically verbatim, the instruction on expert testimony contained in section 1127b of the Penal Code, which instruction provides in part that the jury may disregard any expert opinion if found by them to be unreasonable, the trial judge did not stop there, as the Penal Code section permits him to do, but went on to give several other instructions on the same subject. Among other things he told the jury that they could "regard the testimony of an expert as merely advisory, and you are instructed that you may disregard altogether the testimony of such expert, and you may form your own conclusions from all the evidence submitted to you". This last-quoted instruction goes considerably beyond the language of the Penal Code section. It contains almost identical language to that held to be erroneous in Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451, and to be reversible error in Pearson v. Crabtree, 70 Cal.App. 52, 232 P. 715. We can add nothing to what was said concerning this instruction in these two cases. Whatever may be the value of expert testimony in some cases, in this case the question of the presence or absence of due caution and circumspection, in the nature of things, could be largely proved or disproved only by expert testimony—it was the only means open to defendant in presenting his defense. The instruction told the jury not only that they might disregard any expert opinion as provided in section 1127b of the Penal Code, but, in effect, told them that they could form their own opinion on this subject.

The respondent argues that, even if it be admitted that the Crabtree case, supra, holds that the giving of such an instruction is reversible error, in this case the giving of the instruction was not error because in this case there was no evidence of malpractice. It is in this connection that the concession above referred to is made that no issue of lack of due caution and circumspection was presented in this case. As already pointed out, the issue of lack of due caution and circumspection was directly presented. This instruction should not be given on the retrial.

For the foregoing reasons the judgment and order denying a new trial are, and each is, reversed, and the cause remanded for a new trial.

We concur: WARD, J.; GOODELL, Justice pro tem.

---

35 Cal.App.2d 576

In re TURNER'S ESTATE.
TURNER v. TURNER.

Civ. 12444.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1939.

Hearing Denied Jan. 18, 1940.

1. Husband and wife 🔑273(1)

The alleged fact, that expenditures by husband from community funds for benefit of his separate property did not enhance the value thereof, did not preclude recovery of amount by widow.

2. Husband and wife 🔑273(1)

Solution of question whether community estate is entitled to be reimbursed for money paid out for benefit of the separate property of one of the members requires that the several estates be regarded as separate entities, the integrity of each of which will be preserved either by specific restitution of its own property or by mutual credits and charges where such restitution cannot be made.

3. Husband and wife 🔑273(1)

As respects right of survivor, the community has a claim against the separate estate of either spouse for expenses properly incurred in behalf of such estate.

4. Husband and wife 🔑273(1)

The widow was entitled to reimbursement from husband's estate in amount of community funds expended by husband in payment of taxes and assessments on his separate property, and, in view of fact that survivor of community takes whole thereof in absence of testamentary disposition, was entitled to recover the entire amount thus expended rather than merely one-half thereof.

Appeal from Superior Court, Los Angeles County; J. W. Mullin, Jr., Judge.

Proceeding in the matter of the estate of Robert M. Turner, deceased, wherein Ada C. Turner filed her final account. From a judgment settling the account, Eleanor Turner, contestant, appeals.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

Paul C. Hill, of Los Angeles, for appellant.

Melvin E. MacKinnon, of Los Angeles, for respondent.

MOORE, Presiding Justice.

This is an appeal from a judgment in favor of the surviving wife of the intestate decedent and against his niece. The order settles respondent's final account; adjudges that the community estate is entitled to reimbursement from the separate property of decedent to the amount of community funds expended by decedent in payment of taxes and assessments levied against decedent's separate property and from the order denying the appellant's motion for a new trial.

The decedent married respondent on April 29, 1916. They lived together as husband and wife until his demise on April 18, 1938. During the period mentioned, decedent was a police officer and received a salary ranging from $125 to $225 per month, his only income. Prior to said marriage, decedent purchased two parcels of property, to-wit: Parcel 2, September 5, 1908, then of the value of $800 and parcel 3, December 4, 1911, then of the value of $200. At the time of the death of decedent, said parcels were worth respectively $4700 and $2000. Said parcels continued to be at all times the separate property of decedent, and decedent was always custodian of the community funds out of which decedent paid, on account of taxes and public improvements on both parcels a total of $2655.43.

The question for our determination is: Should the amounts paid by decedent for the preservation of his separate estate be now paid to the community survivor?

[1] I. Appellant proposes that the only deductions chargeable to the separate estate of the decedent are those sums that might have been invested by the husband for the purpose of improving and appreciating his separate property. She contends that no such deduction is proper unless it has enhanced the value of the lands improved. The principles according to which improvements of separate property are chargeable against a separate estate have no application to the instant facts, and the authorities cited by appellant are beside the question. Falconer v. Falconer, 167 La. 595, 120 So. 19; Dillon v. Freville, 129 La. 1005, 57 So. 316; Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620; Clift v. Clift, 72 Tex. 144, 10 S.W. 338; Gilroy v. Richards, 26 Tex.Civ.App. 355, 63 S.W. 664; Waggaman v. Zacharie, 8 Rob., La., 181; Kelly v. Robertson, 10 La.Ann. 303.

It was not the theory of the trial court and it is not the theory of respondent that the separate estate of decedent is being charged with any sums expended for its improvement. What was determined was that the surviving wife should now be credited with the sum of $2655.43 paid out by decedent for the protection of his own property from perilous liens. It is true that general taxes do not increase the value of property; their payment is not an improvement; but it is certain that the payment of general taxes as well as the payment of special assessments for public improvements do preserve the properties from foreclosure of senior liens.

II. There are no definite guides in California decisions for determining whether or not the community estate is entitled to reimbursement for moneys paid for such taxes and assessments. All of the California cases arose out of payments made by the husband out of community funds for improvements of his wife's paraphernal property and no lien is held to have been created in the husband's favor as against the community estate. Dunn v. Mullan, 211 Cal. 583, 296 P. 604, 77 A.L.R. 1015, and authorities cited. But in making such expenditures the husband is presumed to have made a gift to his wife. It is presumed that it was his intention "to advance the money paid for the benefit of the wife's estate, and that it was intended to accrue to her interest". Carlson v. Carlson, 10 Cal.App. 300, 101 P. 923, 925. The reasons given for this holding are two, viz.: (1) he is presumed to have intended a gift because (2) he had authority to control the disposition of community funds. Dunn v. Mullan, supra.

[2, 3] In 31 Cor.Jur. sec. 1179, it is said that the working rule upon which said questions are solved is that the several estates will be regarded as separate entities, the integrity of each of which will be preserved either by specific restitution of its own property or by mutual credits and charges where such restitution cannot be made; and that the community has a claim against the separate estate of either spouse for expenses properly incurred in behalf of such estate. This is clearly the rule in all cases involving improvements made on a separate estate out of community funds except cases mentioned in the next preceding paragraph in which the husband makes improvements on the wife's paraphernal property. Legg v. Legg, 34 Wash. 132, 75 P. 130; Shaw v. Bernal, 163 Cal. 262, 124 P. 1012; Provost v. Provost, 102 Cal.App. 775, 283 P. 842; Dunn v. Mullan, supra; White v. Hebbard, Tex. Civ.App., 89 S.W.2d 482. In the Provost case, supra [102 Cal.App. 775, 283 P. 844], it was held that the failure to reimburse the community "would be to permit the authority of the husband in controlling the community property, given him in the interest of greater freedom in its use and for its transfer for the benefit of both himself and his wife, to become a weapon to be used by him to rob her of every vestige of interest in the community property with which the law has expressly invested her. Such a conclusion would violate every sense of justice, and outrage every principle of fair dealing, known to the law". It is true that that case involved the value of "improvements" made on the husband's lands, but the language quoted may as well have been applied to his payment of taxes levied on his separate estate.

[4] To hold that the surviving wife should not recover moneys paid out by her husband as head of the community and as manager of the community estate for the protection of his separate estate would operate to her loss in all cases where his collateral heirs assert their rights of heirship because of his intestacy. Innumerable situations may occur where the husband has no income but his salary, which is community, while his unimproved separate properties require enormous outlays of money for taxes to say nothing of the endless assessments for public improvements. The entire community income over a period of years would be consumed in conserving the titles to his properties by the expenditure of community funds, only to leave the surviving widow a beggar at his grave with his collateral kindred demanding their portions of his "separate estate".

In the case of Cervantes v. Cervantes, Tex.Civ.App., 76 S.W. 790, the husband abandoned the wife, who thereafter used community funds to pay the taxes on her wayward husband's separate estate. It was held that the husband's lands were liable to the wife's heirs for one-half the cost of the improvements and taxes. "Taxes were expended to preserve the separate estate," said the court, "and should be a charge upon it." There is no more reason why the community should pay decedent's taxes than to pay off a mortgage on his estate.

III. The contention made by appellant that if any credits should be allowed respondent, it should be for only one-half. Apparently she bases her proposal upon the language of the Cervantes case, which allowed the estate of the widow credit for one-half of the sums paid for taxes. But her situation in Texas was different from what it would have been in California. In Texas the widow, as survivor of the community, is entitled to only one-half of the community estate while in California she takes the whole of it in the absence of testamentary disposition.

For the reasons herein indicated, the judgment and order are both affirmed.

We concur: WOOD, J.; McCOMB, J.

35 Cal.App.2d 604

WOOD v. SILVERS et al.

Civ. 6283.

District Court of Appeal, Third District, California.

Nov. 25, 1939.

Rehearing Denied and Opinion Modified Dec. 22, 1939.

See 97 P.2d 265.

1. Venue ⊂⊃69

The issues having been framed by filing of an answer, court properly determined motion to retain cause for convenience of witnesses, though a motion was pending at same time for change of venue to another county wherein defendants resided. Code Civ.Proc. § 397.

2. Venue ⊂⊃52(1), 69

The granting or denial of motion either to change or to retain place of trial for convenience of witnesses is in trial judge's sound discretion. Code Civ.Proc. § 397.

3. Appeal and error ⊂⊃965

An order granting or denying a motion either to change or to retain the place of trial for convenience of witnesses will not be disturbed on appeal except for an abuse of discretion. Code Civ.Proc. § 397.

4. Venue ⊂⊃65, 68, 69

On motion either to change or to retain the place of trial for convenience of witnesses, affidavits for and against retention should be considered with object of conveniencing witnesses and serving ends of justice. Code Civ.Proc. § 397.

5. Venue ⊂⊃52(1), 69

The mere numerical majority of witnesses on one side or the other does not determine the merits of motion either to change or to retain place of trial for convenience of witnesses. Code Civ.Proc. § 397.

6. Witnesses ⊂⊃1

Courts and judicial tribunals have inherent power to compel attendance of witnesses in manner provided by law, the authority being incident to the power to adjudicate causes.

7. Venue ⊂⊃69

Where three witnesses for plaintiff in affidavits supporting motion for retention of place of trial averred that they were employees of plaintiff while five witnesses averred that they had been previously employed by plaintiff, a recital by defendants in counteraffidavits that "affiant admits" that six named witnesses of plaintiff are employed by plaintiff, without affirmative averment that witnesses were so employed, was ineffectual and lacked probative value as proof thereof, so that trial court was justified in assuming that at least several of plaintiff's witnesses were not employed by him after date recited in affidavits. Code Civ.Proc. § 397.

8. Venue ⊂⊃52(1)

Inconvenience of parties will not be considered upon motion for change of venue for convenience of witnesses. Code Civ.Proc. § 397.

9. Venue ⊂⊃52(2, 3), 69

Convenience of neither an expert witness nor employees of a party to the action should be considered on motion for change or retention of place of trial for convenience of witnesses. Code Civ.Proc. § 397.

10. Venue ⊂⊃68

Affidavits opposing change of venue were sufficient, though they might have been more specific in relating reasons why affiants would be inconvenienced by transfer, in absence of motion to strike them from the record on that account. Code Civ.Proc. § 397.

11. Evidence ⊂⊃25(1)

Court will take judicial notice of the location of the various county seats within the state. Code Civ.Proc. § 73.

12. Venue ⊂⊃69

Where affidavits in support of motion by plaintiff for retention of venue in county wherein action was brought recited that affiants were employed in county wherein action was brought and that it would be inconvenient to appear and testify in county to which defendants sought to remove action, trial court did not abuse its discretion in granting motion to retain cause. Code Civ. Proc. § 397.

◆

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by Talmadge Wood against Minnie A. Silvers, doing business under the name of Silver Line Transport, and others, for labor performed and for materials furnished. The defendants moved for a change of venue to their place of residence in Lake County. From an order denying that motion and granting a motion by plaintiff to retain the cause for trial in Sonoma County, Minnie A. Silvers, doing business under the name of Silver Line Transport, Minnie

A. Silvers, individually, Lea Bleakmore, individually, and Philip Bleakmore, individually, appeal.

Affirmed.

H. G. Crawford, of Lakeport, for appellants.

L. R. Lambert, of Santa Rosa, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This action for labor performed and for materials furnished was filed in Sonoma county October 19, 1938. An answer denying the essential allegations of the complaint was filed. The defendants moved for a change of venue to their place of residence in Lake county. At the same time, the plaintiff moved to retain the cause for trial in Sonoma county, pursuant to section 397 of the Code of Civil Procedure, for the convenience of witnesses and to subserve the ends of justice. The last-mentioned motion was supported by affidavits of eight witnesses for plaintiff who reside at Santa Rosa. It was opposed by three affidavits of party defendants who live in Lake county. The court denied the first motion and granted the last-mentioned one to retain the cause for trial in Sonoma county. From that order the defendants have appealed.

[1-6] There appears to be no abuse of discretion on the part of the trial court in granting plaintiff's motion to retain the cause for trial in Sonoma county for convenience of witnesses and to subserve the ends of justice. The issues of the cause having been framed by the filing of an answer, it was proper for the court to determine the motion to retain the cause for convenience of witnesses, even though a motion was pending at the same time for change of venue to another county where the defendants reside. Sheffield v. Pickwick Stages, Northern Division, Inc., 191 Cal. 9, 214 P. 852; Sowers v. Sowers, 127 Cal.App. 579, 16 P.2d 176; National Automobile Ins. Co. v. Havlik, 113 Cal.App. 264, 298 P. 75. The granting or denial of a motion either to change or to retain the place of trial for convenience of the witnesses is addressed to the sound discretion of the trial judge. Such an order will not be disturbed on appeal except for an abuse of discretion. Scott v. Stuart, 190 Cal. 526, 213 P. 947; Plum v. Newhart, 118 Cal.App. 73, 76, 4 P.2d 805; 25 Cal.Jur. 884, sec. 23; 2 Bancroft's Code Pr. & Rem., p. 1449, sec. 1008. Upon that motion the affidavits for and against retaining the cause should be considered with the object of conveniencing the witnesses and serving the ends of justice. The mere numerical majority of the witnesses on one side or the other does not necessarily determine the merits of the motion. Scott v. Stuart, supra; Werner v. Bryden, 99 Cal.App. 398, 278 P. 869; 25 Cal.Jur. 885, sec. 23. It is apparent that in determining the convenience of witnesses the evidence of one or more of them may be more important in deciding the issues involved than a greater number of other witnesses. Certain witnesses may live in localities inaccessible and remote from the place to which the cause is sought to be transferred; the means of conveyance for lack of railroad facilities or the absence of highways may be difficult; the time required of some witnesses in attending court at a remote place may be more valuable than that of others on account of the nature of their employment or the emergency of enterprises in which they are engaged. The administration of justice is founded on the principle that every litigant shall have a fair opportunity to procure the attendance of witnesses to establish his claim. One of the duties which every citizen owes to his government in support of the administration of justice is to attend court and give his evidence when he is properly summoned. It is within the inherent powers of courts and judicial tribunals to compel the attendance of witnesses in the manner provided by law. That authority is incident to the power to adjudicate causes. 70 C.J. 34, sec. 3. In that spirit section 397 of the Code of Civil Procedure was adopted to authorize the change of place of trial "when the convenience of witnesses and the ends of justice would be promoted by the change". It follows that a court possesses a sound discretion in determining, from a consideration of all of the facts related in the affidavits in support of and in opposition to a motion for change of venue, whether the witnesses will be convenienced and whether it is in the interest of justice to grant or deny the application for a change.

[7] In the present case the plaintiff filed the affidavits of eight witnesses, properly reciting the materiality of their testimony. The complaint was filed in this cause October 19, 1938. Three of his witnesses averred that they were employees of the plaintiff at the time their affidavits were filed. Five of the witnesses averred that

they had been previously employed by the plaintiff until various designated dates, the latest of which was July 14, 1938, three months before the complaint was filed. In the defendants' counteraffidavits, they denied the material averments of plaintiff's witnesses, but did not allege that any of plaintiff's witnesses were then employed by him. There are no affirmative averments in any of the affidavits that plaintiff's last-mentioned five witnesses were employed by him at the time of the filing of the complaint. The defendants did state that "Affiant admits" that six named witnesses of plaintiff are "now employed by plaintiff in the capacities set forth in said Affidavits". The defendants further offered to stipulate that plaintiff's witnesses, Erdman and Cunningham, would testify at the trial as they had in their affidavits averred the facts to be.

In the absence of an affirmative averment that certain witnesses were employed by the plaintiff at the time of filing his complaint, a mere admission by the defendant of the fact not stated by plaintiff's witnesses is ineffectual and lacks probative value as proof thereof. The state of the record, therefore, justified the trial court in assuming that at least several of plaintiff's witnesses were not employed by him later than July 14, 1938, when they clearly imply that their services terminated. We must assume, for the purpose of this appeal, that several of plaintiff's witnesses were not employed by him at the time of the commencement of this action.

[8, 9] In the case of Wrin v. Ohlandt, 213 Cal. 158, 1 P.2d 991, it was held that the inconvenience of the parties to the action will not be considered upon a motion for change of venue for the convenience of witnesses. So, also, it has been held in California that the affidavits of neither an expert witness nor employees of a party to the action should be considered on such a motion. Security Investment Co. v. Gifford, 179 Cal. 277, 176 P. 444; Pacific States Corp. v. Shepardson, 105 Cal.App. 747, 288 P. 714; Barnett v. United Oil Co., 5 Cal.App.2d 175, 42 P.2d 656; Wrin v. Ohlandt, supra. In some states it is held that affidavits of employees of a party to an action who seeks to change the place of trial for the convenience of witnesses, is not to be disregarded, wholly, but that it is not entitled to the same consideration as other witnesses who are not so vitally interested in the outcome of the action. 67 C.J. 161, sec. 259. We are, however, controlled by the rule of this state in that regard.

Disregarding the affidavits of the three witnesses of plaintiff who were employed by him at the time of the commencement of the action, and the convenience of the two witnesses, Erdman and Cunningham, to whose testimony the defendants offered to stipulate, there remains the affidavits of three other witnesses, whose convenience the trial court was clearly entitled to consider. That showing, as a whole, is adequate to support the order of the court.

There is nothing in the case of First-Trust Joint Stock Land Bank of Chicago v. Meredith, 16 Cal.App.2d 504, 60 P.2d 1023, 62 P.2d 369, upon which the appellants rely, in conflict with what we have previously said regarding the sufficiency of the affidavits to support the order retaining the cause for trial in Sonoma county. In that case an order granting a similar motion was properly reversed on account of insufficient averments of the affidavits. The court said neither the names nor the residences of the affiants were alleged; that it was not stated the affiants would testify to the facts recited in their affidavits, and that it was not alleged the affiants did not live in the county to which the case was transferred. Clearly, those omissions rendered the affidavits insufficient to support the order. In the present case, however, each affiant specifically avers that he will testify to the facts recited, and in each affidavit the name and residence of the witness are given. In this case the complaint and answer settled the issues to be tried and the court was enabled to determine from them the materiality of the averments of the affidavits.

[10, 11] While the affidavits might have been more specific in relating the reasons why the affiants would be inconvenienced by a transfer of the cause to Lake county, we are of the opinion they are adequate in that regard in the absence of a motion to strike them from the record on that account. No such motion was made. The insufficiency of the affidavits in that regard is urged for the first time on appeal. Each affidavit states that the affiant is "employed in Santa Rosa, Sonoma County, California, and that it would be extremely inconvenient * * * to appear and testify in the above entitled action in the Superior Court of Lake County". The reasonable inference to be drawn from the above-quoted statement is that it would be inconveni-

ent to travel from Santa Rosa to the county seat of Lake county to testify in the case on account of the distance and expense incident thereto. Generally, all regular sessions of the superior court must be held at the county seats of the respective counties. Section 73, Code Civ.Proc. Courts will take judicial notice of the location of the various county seats within the state. People v. Faust, 113 Cal. 172, 45 P. 261; People v. Etting, 99 Cal. 577, 34 P. 237; 10 Cal.Jur. 710, sec. 35; 23 C.J. 84, sec. 1867.

[12] It does not appear the court abused its discretion in granting the motion of plaintiff to retain the cause for trial in Sonoma county.

The order is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

---

37 Cal.App.2d 648

STULZ v. BACON.

Civ. 11123.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1939.

1. Judgment 🔑910(3)

Limitations begin to run against an action on a judgment only after the date upon which the judgment becomes final. Code Civ.Proc. § 336, subd. 1.

2. Judgment 🔑910(3)

In determining the date upon which limitations commenced to run against action on judgment, where debtor had 30 days after notice of rendition of judgment to file appeal, the court would assume, nothing to the contrary appearing, that debtor had immediate notice of the rendition of judgment. Code Civ.Proc. § 336, subd. 1.

3. Time 🔑10(4)

Where judgment was rendered May 19, 1933, and 30 days in which to file appeal expired on June 18, 1933, which was a Sunday, limitations commenced to run against action on judgment on June 19, 1933, so that statutory period of five years expired June 19, 1938, and action commenced on June 15, 1938, was not barred by limitations. Code Civ.Proc. § 336, subd. 1.

◆

Appeal from District Court, San Mateo County; A. R. Cotton, Judge.

Action by George Stulz against George V. C. Bacon to recover the amount due on an alleged judgment. From a judgment on order sustaining demurrer to complaint without leave to amend, the plaintiff appeals.

Reversed.

Horace F. Frye, of Sacramento, for appellant.

Charles M. Frey, of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff commenced an action against the defendant to recover the amount due on an alleged judgment. The defendant appeared and filed a demurrer. In said demurrer he alleged that the complaint did not state facts sufficient to constitute a cause of action against him; that the cause of action was barred by the provisions of subdivision 1 of section 336, subdivision 1 of section 337, and the provisions of section 343 of the Code of Civil Procedure. The trial court made an order sustaining the demurrer without leave to amend. From the judgment entered thereon the plaintiff appealed.

[1-3] The form of the complaint filed by the plaintiff was a model of good pleading. Therefore the first attack has no merit. It is not controverted that subdivision 1 of section 336 of the Code of Civil Procedure is the statute of limitations applicable to an action on a judgment. However it is settled law that the statute of limitations begins to run only after the date the judgment becomes final. Feeney v. Hinckley, 134 Cal. 467, 66 P. 580, 86 Am.St.Rep. 290. In the instant case the record shows that the judgment sued on was rendered May 19, 1933. It was rendered by the justice's court of Sacramento Township. The defendant in that action had thirty days after notice of the rendition of the judgment to file an appeal. Nothing to the contrary appearing we assume he had immediate notice of the rendition of the judgment. The time to appeal, therefore, expired June 18, 1933. That day was Sunday. The statute of

limitations therefore commenced to run on June 19, 1933. Code Civ.Proc. sec. 12a. The statutory period of five years, Code Civ.Proc., subd. 1, sec. 336, would expire June 19, 1938, but this action was commenced on June 15, 1938. It is clear, therefore, that the action was commenced in time and that the trial court erred in sustaining the demurrer.

The judgment appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

35 Cal.App.2d 639

BREITENGROSS v. THEODORE KRUMM, Inc.

Civ. 2196.

District Court of Appeal, Fourth District, California.

Nov. 27, 1939.

1. Sales 🔑200(1)

Where, under contract of sale, seller has things to do in order to put the goods in a deliverable state, the performance of such things on the part of the seller is usually a condition precedent to the passing of title.

2. Sales 🔑200(1)

Under contract for sale of oranges growing in described grove, acknowledging receipt of part of price and providing that taking and hauling were to be done at expense of buyer, that balance of price was to be paid 10 days after fruit was picked, that no windfall, split, offbloom, soft or frozen fruit was contracted for, and that seller was to look after, irrigate and cultivate grove whenever necessary, title passed to buyer at time of contract, so that risk of freezing thereafter was on buyer, where, at time contracts were entered into, oranges were merchantable and ready for picking. Civ.Code, § 1739.

3. Brokers 🔑86(1)

Evidence justified judgment for commissions on sale of oranges which were frozen before being picked by buyer on ground that title to fruit passed at time of contract as against contention that commissions were not to be paid until oranges were picked and delivered to defendant's packing house. Civ.Code, § 1739.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by A. H. Breitengross against Theodore Krumm, Inc., for the price of oranges and commissions in connection with the sale of other oranges. Judgment for plaintiff in the sum of $983, and the defendant appeals.

Affirmed.

Theodore G. Krumm, of San Bernardino, for appellant.

Howell W. Richardson, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action to recover the agreed selling price of certain oranges and certain commissions in connection with the sale of other oranges.

On December 9, 1936, a written contract was entered into between the plaintiff as "Seller" and the defendant as "Buyer", which provided that the "Seller has sold and the Buyer has bought the entire crop of merchantable" oranges then growing on a described grove, at $1.50 per cwt. It was agreed that the picking and hauling were to be done at the expense of the buyer at the time and in the manner directed by it, receipt of a part of the purchase price was acknowledged, and it was provided that the balance was to be paid ten days after the fruit was picked. It was further agreed that "no windfall, split, offbloom, soft or frozen fruit is contracted for or is to be paid for under the terms of this contract". A further provision, that the seller is to look after and irrigate and cultivate the grove whenever necessary, is a part of the contract form that was used but, as shown by the evidence, this provision had no application here.

The oranges in question were destroyed by a freeze on January 7 or 8, 1937. The complaint in this action contained one count based upon the oranges covered by the above-described contract and three other counts based upon similar contracts, in each of which the cause of action had been assigned to this plaintiff. There were two additional causes of action for commission which the defendant had agreed to pay in connection with the sale of other oranges upon similar contracts.

There was evidence that at the time these contracts were entered into the oranges in the respective crops were all merchantable and free from any splits, off-bloom and soft fruit, and that all of said oranges were then ripe and ready for picking. There is also evidence that on several occasions prior to the date of the freeze the plaintiff and his assignors informed the defendant that the crops were ready to be picked, that the defendant assured them that he would pick the oranges shortly, that there were many days of good picking weather between the date of the contracts and the date of the freeze, and that between those dates the defendant picked oranges from other groves which it had subsequently purchased at a lower price.

The court found in all respects in favor of the plaintiff and awarded him a judgment for $983, from which this appeal was taken.

[1] The main point raised by the appellant is that it conclusively appears from the contracts themselves that they were executory and did not pass the title to this fruit, and that the risk of freezing remained with the respondent and his assignors. The appellant relies upon such cases as Wanee v. Thomas, 75 Cal.App. 231, 242 P. 509; Pfoh v. Porter, 23 Cal.App. 59, 137 P. 44; MacRae v. Heath, 60 Cal.App. 64, 212 P. 228; Walti v. Gaba, 160 Cal. 324, 116 P. 963; Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 P. 248, 9 Am.St.Rep. 199. In each of those cases the goods in question were to be delivered by the seller. In the first case cited, rice was not only to be so delivered but was to be paid for only if it came up to a sample which had been furnished. In each of the other cases the crop in question had not yet matured and the seller still had things to do in order to put the goods into a deliverable state. As pointed out in the case of Walti v. Gaba, supra, under those circumstances the performance of such things on the part of the seller is usually a condition precedent to the passing of title.

[2] In the instant case, a somewhat different situation appears both from the face of the agreement and from the evidence. The contracts use language indicating a present sale, provide that the buyer is to come and get the crop, and leave nothing to be done by the seller, with the possible exception of cultivating and irrigating the groves "when necessary". The evidence shows that there was no necessity for such work in connection with these particular crops as they were then ready for picking. Moreover, the evidence shows that the crops of fruit were merchantable in their entirety, and that no segregation was necessary.

Section 1739 of the Civil Code provides that unless a different intention appears certain rules are to be applied in ascertaining the intention of the parties as to the time when title to goods shall pass to the buyer. Rule 1 is as follows:

"Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed."

This rule is here applicable, and there is nothing in the contracts or the evidence which indicates a contrary intention.

It cannot be said, as a matter of law, that the contracts in question conclusively show upon their face that they were executory in nature and that, therefore, title did not pass. The language of the contracts and the evidence justified the court in holding that title to the oranges passed at the time the contracts were entered into. Bill v. Fuller, 146 Cal. 50, 79 P. 592; Miller v. Hunt, Hatch & Co., 47 Cal.App. 768, 191 P. 75; Lassing v. James, 107 Cal. 348, 40 P. 534.

[3] The appellant makes the further contention that $135 of the judgment, representing the amounts awarded on the two causes of action involving commissions for the sale of fruit, may not be sustained because under the contracts for the payment of such commissions nothing was to be paid until the oranges were picked and delivered to the appellant's packing house. No such contractual provision is pointed out, and it seems clear from the evidence that the question of whether such commissions were to be paid depends entirely upon whether title passed to the fruit involved in those causes of action. The decision on this point must follow the decision on the main point raised.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

35 Cal.App.2d 571

PEOPLE v. KELLY.

Cr. 3265.

District Court of Appeal, Second District, Division 1, California.

Nov. 22, 1939.

Hearing Denied Dec. 22, 1939.

1. Criminal law ⚷998

A defendant who sought to have a judgment of conviction for bigamy which had been affirmed on appeal and sentence vacated on ground of mistake of fact consisting of his failure to disclose to his counsel the bigamous nature of a second marriage to a woman to whom he was allegedly married at time of contracting third marriage and that he had not heard from first wife for more than five years was not entitled to have judgment vacated since mistake of defendant was a "mistake of law" and not a "mistake of fact" under the statute. Civ. Code § 1577.

[Ed. Note.—For other definitions of "Mistake of Fact" and "Mistake of Law," see Words & Phrases.]

2. Criminal law ⚷997

The applicant for a writ of coram nobis should be held to reasonable diligence in asserting his claim.

3. Criminal law ⚷998

A defendant should not be permitted to take his chances upon an appeal and then, following an unfavorable result, be allowed to urge for first time, in order to have whole proceeding gone over again, a motion to vacate judgment and sentence which he either neglected or preferred not to make prior to prosecution and determination of appeal.

4. Criminal law ⚷997

The "writ of error coram nobis" is designed to keep pure the administration of justice and is not intended to enable the guilty to escape punishment.

[Ed. Note.—For other definitions of "Writ of Error Coram Nobis," see Words & Phrases.]

5. Criminal law ⚷997

A defendant whose appeal from a bigamy conviction was affirmed was not entitled on writ of error coram nobis to have judgment and sentence vacated on alleged mistake of fact consisting of his failure to inform his counsel that a prior marriage which was assumed to be valid during trial was in fact bigamous where all facts were known to defendant before and during trial and defendant preferred to speculate on outcome of appeal.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Leonard Kelly was convicted of bigamy. On motion to vacate and set aside judgment of conviction which had been affirmed by the reviewing court. From an order denying such motion, defendant appeals.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Defendant, under the name of Jack Sinclair, was charged with the crime of bigamy, in that he "did knowingly, willfully and feloniously marry one Virginia Roszkowski, said defendant being then and there the lawful husband of another person, to-wit, Louise J. Sinclair, * * *." A trial before a jury resulted in a verdict of guilty, whereupon, it appears, defendant for the first time disclosed to his counsel that prior to his marriage to Louise J. Sinclair he had been lawfully married to one Ella Miller, but had not heard from her for more than five years prior to his marriage to Virginia Roszkowski. This fact was presented to the trial court upon a motion for a new trial as "newly discovered evidence". The motion being denied, defendant appealed, and the judgment of conviction and the order denying the motion for new trial were affirmed by Division Two of this court. People v. Kelly, 32 Cal.App.2d 624, 90 P.2d 605. Upon the going down of the remittitur after denial of a hearing by the Supreme Court, defendant moved the trial court to vacate and set aside the judgment. This appeal is from the order denying such motion.

In support of his motion to vacate the judgment the defendant filed an exemplified copy of a certificate of his marriage to Ella Miller in Jefferson county, Kentucky, and an affidavit by the clerk of the circuit court of Jefferson county, Kentucky, to the effect that the records of that court disclosed no action of divorce between defendant and his first wife, Ella.

There was also filed in support of the motion an affidavit by defendant himself alleging, in substance, that he married Ella Miller in 1921 in Louisville, Kentucky; that in December, 1922, he was convicted of a crime in Indiana and was imprisoned for a period of thirteen months thereafter; that upon his release from prison Ella told him she desired to obtain a divorce, and affiant gave her the money to obtain the divorce and then left Kentucky; that in 1926, under the name of Jack Sinclair, affiant married Louise Trotter, in Cleveland, Ohio, believing he was divorced from Ella, and he and Louise Trotter lived together as man and wife until February, 1938; that in 1929 affiant visited Louisville and met Ella, who told him she had not obtained a divorce, whereupon he again gave her money to obtain a divorce; that affiant has never been served with divorce papers, nor has he any knowledge or information that Ella ever obtained a divorce; that during 1930 he attempted to contact Ella, but his letters to her and to her relations were returned unopened or remained unanswered, and that affiant is ignorant of her whereabouts and has not seen or heard from her since 1929; that in April, 1938, affiant's second wife, Louise, informed him that she had divorced him, and about May 1, 1938, ejected him from their home, at the same time showing him papers which she stated were her divorce papers; that believing he was divorced from Louise, he married Virginia Roszkowski in June, 1938.

As excusing his failure to disclose these facts to his counsel until after he was convicted, affiant alleged: "That affiant did not inform his counsel * * * of the fact of his marriage to said Ella Miller, until after his trial was completely over and a verdict of guilty of bigamy had been returned against him by the jury on the 27th day of October, 1938, because affiant was in total ignorance of the materiality of said facts. That affiant believed that the fact that he had not heard from said Ella, for so many years validated his marriage to said Louise, and that he never gave the matter any consideration whatsoever and did not deem the facts important enough to discuss with his attorney."

The matter before us, entitled "motion to vacate judgment and sentence", is concededly what is sometimes known as an application for a writ of error coram nobis, the two being legal equivalents. By appellant's motion the court was asked to vacate the judgment and sentence pronounced against him by reason of his claim that his marriage to Louise Trotter was bigamous since Ella was his wife at the time of its solemnization, but that his marriage to Virginia Roszkowski is valid because he had not heard from Ella for five years. This he asserts pursuant to the provisions of subdivision 1 of section 282 of the Penal Code. In other words, appellant is before the court admitting that he committed the crime of bigamy when he married Louise Trotter on April 5, 1926, but that he was not prosecuted on the offense that could be proven against him, but was, he says, prosecuted on a charge involving his last marriage, to Virginia Roszkowski, which he claims was not bigamous because he had not heard from Ella Miller, whom he first married, for five years. The fact that he was admittedly guilty of bigamy when he entered into his second marriage may well account in both logic and reason for his neglect to advise his counsel thereof prior to his conviction.

[1] From appellant's affidavit it is apparent that he went through his trial on the theory that his second marriage, to Louise Trotter, was legal, because in his affidavit he deposes that "affiant believed that the fact that he had not heard from said Ella, for so many years validated his marriage to said Louise". Then, waiting until after his conviction and the affirmance thereof on appeal, appellant asks us to set aside such conviction and the judgment predicated thereon because of the illegality of a marriage which he considered and asserted to be legal at his trial. It is manifest that appellant was not laboring under any mistake of fact as defined by section 1577 of the Civil Code, but that his was a mistake of law, for as was said in O'Brien v. Selskab, 94 N.J.L. 244, 246, 109 A. 517; 40 Corp.Jur. 1227, "A 'mistake of fact' is where a person understands the facts to be other than they are; whereas a 'mistake of law' is where a person knows the facts as they really are, but has a mistaken belief as to the legal consequences of those facts."

Further, even though the truth of the facts forming the basis of appellant's motion be conceded, and if presented at his trial might have brought about a different result, it does not necessarily follow that he is here entitled to the relief sought. The rule in this regard is well summarized in State v. Boyd, 117 Neb. 320, 220 N.W. 281, 282, 58 A.L.R. 1283, wherein appears the following language:

[2] "If the defendant has knowledge of a fact which, if divulged, would be for his benefit, he should not be permitted to conceal such fact, take his chance upon the issue, and, being disappointed therewith, ask the court to relieve him from the consequences of his own intentional or negligent act. To allow such procedure would countenance trifling with the courts to an extent very much greater than their tenderness for the rights of persons accused of crime already has permitted."

[2-5] The nature and purpose of a writ of error coram nobis, both at common law and where permitted under our procedure in this state, are fully set forth in People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435, and need not here be repeated. Suffice it to say that when recourse is had to this rather unusual remedy under our procedure the applicant therefor should be held to reasonable diligence in asserting his claim. Even if we assume that the purpose of the writ could be so extended as to cover a situation which, as here, was fully known and brought out in open court on the motion for new trial prior to judgment, the defendant should not be permitted to take his chances upon an appeal and then, following an unfavorable result, be allowed to urge for the first time, in order to have the whole proceeding gone over again, a motion such as the one before us, which he either neglected or preferred not to make prior to the prosecution and determination of his appeal. In the case at bar we do not find that freedom from negligence or excusable mistake which would warrant the application of the extraordinary writ sought. Neither do we find that requisite diligence in utilizing it after the alleged grounds for its application first appeared in the record. Appellant's own affidavit in support of his motion demonstrates that of the three marriages to which he was a party he contracted both the second and third without dissolution of the preceding ones. The writ of error coram nobis is designed to purify and keep pure the administration of justice, and was never intended to enable the guilty to escape punishment. Under the facts here presented the courts cannot indulge in strained inferences that appellant was in fact married to someone else when he contracted his second marriage and therefore should be absolved of legal wrong in marrying his third wife under the representation that he was an unmarried man. When, as in the instant case, the facts complained of were known to the defendant before and during the trial and advantage could have been taken thereof at the trial and was taken on the motion for new trial, and where, as here, defendant preferred to speculate on the outcome of the appeal, we are unable to discover any reason based either upon general principles or upon the particular showing here made, why the appellant is entitled to the relief for which he petitions. To hold otherwise would be to validate and recognize a rule that would be most disastrous in its results, so far as order and system in the administration of justice are concerned.

The order appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

35 Cal.App.2d 587

PEOPLE v. WATSON.

Cr. 3268.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1939.

1. Larceny ⇐65

Evidence justified conviction for grand theft.

2. Criminal law ⇐1169(2)

In prosecution for grand theft, error, if any, in permitting witness to testify that complaining witness selected at the police station a photograph of defendant as the guilty party was required to be disregarded on appeal even if evidence was inadmissible in view of positive identification of defendant by the complaining witness since action resulted in no prejudice to defendant. Const. art. 6, § 4½.

3. Criminal law ⇐597(1)

Denial of defendant's motion for a continuance for the purpose of producing a jailer who would give testimony contradicting that of a witness as to the clothing de-

fendant wore at the time of his arrest was not error in view of positive identification of defendant as guilty party by complaining witness.

4. Criminal law ⚷940

Denial of defendant's motion for new trial on ground of newly discovered witness whose affidavit stated that she visited defendant shortly after his arrest and that he was not attired at that time according to the description of his clothing given by police officer who arrested defendant was not error since evidence was collateral.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Claude D. Watson was convicted of grand theft and from the judgment of conviction and from an order denying his motion for a new trial he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

McCOMB, Justice.

From a judgment of conviction of grand theft after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

Viewing the evidence most favorable to the People (respondent), the essential facts are:

January 6, 1939, the complaining witness, Virgie James, and an unidentified colored woman were walking on Seventh street in the city of Los Angeles, when defendant carrying a wallet stuffed full of something which appeared to be money came across the street into the presence of the women. The woman accompanying the complaining witness thereupon stated to him, "Go on, Mister, go on, I saw you pick it up, we saw you pick it up." Defendant then stated in substance that they all saw him pick it up but that he did not steal it. Defendant then stated to the two women that he would divide the money with them but that it would be necessary for them to put up some money to show good faith. The complaining witness thereafter drew $900 from the bank and turned it over to the defendant as evidence of her good faith. She did not see the defendant thereafter until he was arrested nor did she receive a return of the money or any portion thereof or any part of the contents of the wallet.

Defendant relies for reversal of the judgment on these propositions:

First: The evidence is insufficient to sustain the judgment.

Second: The trial court committed prejudicial error in overruling defendant's objections in the following examination:

"Q. Did you take her someplace to see a photograph? A. No. She came into the Bunco Detail Office, Room 38, City Hall.

"Q. What occurred there?

"Mrs. Root: I object to that on the ground it is incompetent, irrelevant and immaterial, and self-serving.

"The Court: The objection is overruled. You opened the gate yourself as to that identification; I did not.

"Mr. Hammon: Maybe I can limit it.

"Q. Did you have on that occasion, or somebody have on that occasion, a group of photographs of people among which was the photograph of this defendant?

"Mrs. Root: Just a moment, I object to that upon the ground it is hearsay, incompetent, irrelevant and immaterial, and self-serving.

"The Court: The objection is overruled. Did you show some photographs to this lady?

"A. I did.

"The Court: Did she pick any photographs out?

"A. She did.

"The Court: What photograph did she pick out, if you know?

"Mrs. Root: Just a moment, I object. I am sorry to make an objection to your Honor's question, but for the purpose of the record I will object to that on the ground that the photograph itself would be the best evidence: that it also calls for a conclusion, and that it is incompetent, irrelevant and immaterial.

"The Court: The same ruling. What photograph did she pick out, if you know?

"A. She picked out a photograph of one Claude Watson, the defendant Watson, the defendant in this case.

"Mr. Hammon: That is all.

* * * * * *

"Q. Did you suggest to her a photograph to be picked out of the group?

"Mrs. Root: Just a minute before you answer that, we object upon the ground it calls for a conclusion of the witness, is hearsay, and incompetent, irrelevant and immaterial.

"The Court: If you will open the gate, I can't close it for you, Mrs. Root. The objection is overruled.

"A. I did not."

Third: The trial court committed prejudicial error in denying defendant's motion for a continuance for the purpose of producing a jailer who would give testimony contradicting that of a witness as to the clothing defendant wore at the time of his arrest.

Fourth: The trial court committed prejudicial error in denying defendant's motion for a new trial on the ground of newly discovered evidence.

[1] As to defendant's first proposition, we have examined the record and find that there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the facts set forth above and each and every material finding of fact upon which the jury's verdict was necessarily predicated. Further discussion of the evidence is unnecessary. Thatch v. Livingston, 13 Cal.App.2d 202, 56 P.2d 549; People v. Groves, 9 Cal.App.2d 317, 321, 49 P.2d 888, 50 P.2d 813; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

[2] Defendant's second proposition is untenable. An examination of the questions to which defendant objected indicates that he claims error because the trial court permitted a witness to testify that the complaining witness selected at the police station a photograph of defendant as the guilty party. Even though such evidence was inadmissible, it clearly has not resulted in prejudice to defendant, in view of his positive identification by the complaining witness, and we must therefore disregard such error, pursuant to the requirements of article VI, section 4½ of the Constitution of the state of California.

[3] Defendant's third proposition is without merit. In view of the positive identification of defendant as the guilty party by the complaining witness, it was entirely immaterial as to what clothing defendant wore at the time of his arrest, which occurred more than a month after the commission of this crime. Therefore, the trial court properly denied his motion for a continuance.

[4] Defendant's final proposition is likewise without merit. Defendant filed an affidavit in which the affiant stated that she visited defendant shortly after his arrest and that he was not attired at that time according to the description of his clothing given by the police officer who arrested defendant. Such evidence was collateral matter and not material to any issue before the court. Hence the court did not err in denying defendant's motion for a new trial.

The judgment and order appealed from are and each is affirmed.

We concur: MOORE, P. J.; WOOD, J.

---

35 Cal.App.2d 349

McKAY v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 12334.

District Court of Appeal, Second District, Division 2, California.

Nov. 2, 1939.

Hearing Denied Dec. 28, 1939.

1. Mines and minerals 🔑79(1)

On delivery of nonnegotiable note, payable from third of accrued royalties on oil from wells on certain land, and order to make payments prescribed in note, by maker to depositary of royalties, plaintiff's title to third interest in royalties fund was complete, in absence of fraud or mistake. Civ. Code, §§ 1056, 1059.

2. Mines and minerals 🔑79(1)

A nonnegotiable note, payable from third of royalties on oil from wells on described land, was partial assignment of fund created by such royalties, and was final, in absence of creditors' claims, and as enforceable as any valid conveyance of thing in action.

3. Executors and administrators 🔑202(1)

The executor of estate of deceased maker of nonnegotiable note, payable from third of royalties on oil from wells on described land, cannot avoid payment of note out of such royalties, where depositary thereof accepted maker's order for such payment and there are no creditors claiming right to share in such assigned portion of fund.

4. Mines and minerals 🔑79(1)

A holder of nonnegotiable note, payable from third of royalties on oil from wells on described land, and contemporaneously accepted order from maker to depositary of royalties for payment of note, had indefeasible title to assigned portion of such royalties, where no senior rights to any portion of such interest were established.

5. Mines and minerals 🔑79(1)

Delivery of nonnegotiable note, payable from third of royalties on oil from wells on described land, and order for payment thereof from such fund, by maker to depositary of royalties, and depositary's acceptance of such order, created equitable assignment and gave payee's title to such interest precedence over other assignments or liens.

6. Assignments 🔑48

To create equitable assignment, it is sufficient if entire transaction shows that parties' intention was to pass title to assigned interest in fund and that payment thereof should be made to equitable assignee.

7. Appeal and error 🔑1008(1)

A postscript on nonnegotiable note over payee's signature that "I accept this gift" is of no consequence in passing on contention of executor of deceased maker's estate that note was gift without consideration, where trial court found from evidence that note was delivered for valuable consideration.

8. Evidence 🔑419(15)

In action for balance due on nonnegotiable note, bearing postscript over payee's signature to effect that note was gift, court properly received parol evidence of parties' antecedent transactions to ascertain true consideration for note. Code Civ.Proc. § 1962.

9. Mines and minerals 🔑54(3)

In action for balance due on nonnegotiable note, payable from third of royalties on oil from wells on described land, evidence of original conveyance of third interest in oil-bearing land by plaintiff to maker of note, delivery of maker's note for larger amount on plaintiff's quitclaim of such interest, subsequent litigation arising from maker's attempt to cancel original note, and written stipulation for compromise of such litigation, established adequacy of consideration for note sued on.

10. Executors and administrators 🔑271

A note, payable from interest in royalties on oil from wells on described land, could not constitute claim against deceased maker's general estate.

11. Executors and administrators 🔑224

One claiming as his own specific property held and claimed by decedent's estate is not creditor of estate and need not present claim to executor for such property.

12. Executors and administrators 🔑229

The filing of claim with executor of decedent's estate for balance due on decedent's nonnegotiable note, payable from third of royalties on oil from wells on described land, was meaningless and its rejection harmless, so as to obviate necessity for consideration thereof in payee's subsequent action against executor for such balance, where plaintiff never claimed right to payment thereof from decedent's general estate or any fund other than portion of royalties conveyed by note and order on depositary bank for payment thereof and specifically waived right to any interest in estate. Probate Code, § 716.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Robert McKay against the Security-First National Bank of Los Angeles, as executor of the last will and testament of Ida M. T. Miller, deceased, and others, for the balance due on a note. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Merriam, Rinehart & Merriam, of Pasadena, for appellant.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

This is an appeal by defendant from a judgment in favor of plaintiff for the unpaid balance of a certain nonnegotiable promissory note in favor of the plaintiff by his deceased sister, Ida M. T. Miller. The note dated April 25, 1928, is for the sum of $39,688.93; is to bear no interest; to remain in effect during the life of plaintiff unless sooner paid; be paid out of one-third of the royalties from the oil well or wells producing on the parcel of land described in the note, and to terminate in the event of the cessation of said production. Following the signature of decedent is a postscript signed by the plaintiff: "I accept this gift under the within terms and conditions." Decedent departed this life in January, 1938.

The trial court found that the note was in fact supported by an adequate consideration, having been executed in compromise of an action involving the unpaid balance of a former note of decedent for $100,000; that plaintiff is the lawful owner and holder of said note; that one-third of the royalties accrued as of the time of the trial was $1,713.24; that no contest of the executor's rejection of plaintiff's claim had been made; that plaintiff during the course of the trial waived all recourse against the general assets of the estate of the said decedent other than his right to one-third of said royalties until the balance of said note should be paid in full; that decedent during her lifetime made valid and binding transfers to plaintiff of the said one-third of the moneys accrued, and to accrue, from said royalties until he shall have received the balance of $8,994.36; and that plaintiff's claim thereto is valid.

Based upon such findings, the court decreed judgment in favor of the plaintiff for said last-mentioned sum, payable out of said one-third of the royalties accrued and to accrue, until said sum shall have been fully paid, and directed said Bank of America, the depositary of said royalties, to pay plaintiff one-third of all such royalties until payment in full of said balance, and further adjudged that neither the said husband of decedent nor the said appellant has any right, title, or interest in or to the one-third of said accruing or accrued royalties until plaintiff shall have received said sum.

The bases of its appeal are: (I) In the absence of clear and convincing evidence showing such intention, a promissory note payable out of a specific fund does not constitute a partial assignment of such fund; (II) a recital in a promissory note that it is accepted as a gift and the acceptance thereof by the payee as a gift estops the payee to assert that it was for a valuable consideration; (III) a promissory note made payable out of a specific fund cannot under any circumstances operate as a partial assignment of a larger fund in the absence of a showing of an adequate consideration for the note.

[1] I. As between the decedent and her brother, the instrument was her irrevocable obligation to pay plaintiff the sum promised. In order doubly to insure such payment she executed and delivered a separate order which was accepted directing the depositary of the fund to make the payments prescribed in the note. Upon the delivery of the note and the said order by the decedent to the said depositary bank, title of the plaintiff to the interest conveyed was complete. Civ.Code, §§ 1056, 1059; Burkett v. Doty, 176 Cal. 89, 167 P. 518. Such was the intention of decedent, as demonstrated not only by her written act of authorization to said depositary to make the payments but also by her subsequent acquiescence in the payments over a period of nine years, during which time the amount of the note was reduced from $39,688.93 to $8,994.36 at the time of her death. To effect a defeat of the transfer of the interest conveyed to plaintiff would require a pleading and a finding that the assignment is void for fraud or mistake, and neither is suggested. The method adopted by decedent for the purpose of making payment of the sum of the note was evidently to safeguard her residuary interest in the entirety of the royalties but not to avoid or qualify her obligation to discharge said note. Decedent had a right to dispose of her royalties. Her order upon her depositary to pay any portion of it to her creditor was effective and effected upon the delivery of the instruments designed to accomplish that purpose.

[2] The note was in truth a partial assignment of the fund created by the oil royalties. Burkett v. Doty, supra. It is final in the absence of the claims of creditors and is as enforcible as any valid conveyance of a thing in action. Fidelity Savings & Loan Ass'n v. Rodgers, 180 Cal. 683, 182 P. 426; Guggenhime & Co. v. Lamantia, 207 Cal. 96, 276 P. 995; Donohoe-Kelly Banking Co. v. Southern Pac. Co., 138 Cal. 183, at page 191, 71 P. 93, 94 Am.St.Rep. 28.

[3] The executor of decedent's estate cannot avoid payment of the note out of

the royalties assigned for two reasons: (1) The order for the payment of the royalties was accepted by the depositary in 1928; and (2) there are no creditors claiming the right to share in that portion of the fund assigned to plaintiff. Guggenhime & Co. v. Lamantia, supra.

[4] Holding a partial assignment of a designated fund and a contemporaneously accepted order to the depositary for its payment, and no rights senior to those assigned having been established to any portion of the one-third interest conveyed by decedent to him, plaintiff's title to the portion assigned to him is indefeasible. Goldman v. Murray, 164 Cal. 419, 129 P. 462.

[5, 6] Moreover, the delivery of the note and the order for its payment out of the fund to the depositary and the acceptance thereof by said depositary created an equitable assignment by the decedent and gave plaintiff's title precedence over any other assignment or lien. McIntyre v. Hauser, 131 Cal. 11, 63 P. 69. The language of the note and the order were sufficient to create an equitable assignment. It is sufficient if, from the entire transaction, it appears that the intention of the parties was to pass title and that payment should be made to the one who becomes the equitable assignee. Goldman v. Murray, supra.

Appellant's cited authorities to the effect that an agreement to pay a debt out of specific funds does not constitute an equitable assignment are not in point. In the case of State Central Savings Bank v. Hemmy, 8 Cir., 77 F.2d 458, 460, the appellant bank having procured from the bankrupt an instrument providing for the payment out of the proceeds to be received by the bankrupt from certain insurance policies, the court held that there must be a distinct appropriation of the funds for the payment of the debt and that "such appropriation must amount to a transfer and an establishment of a right in rem." The instrument in question did not operate as an assignment because it did not contain words of appropriation or of transfer. Since the parol evidence concerning the entire transaction was in direct conflict as to the nature of the arrangements, the Circuit Court of Appeals declined to disturb the findings of the referee.

In the case of Lone Star Cement Corporation v. Swartwout, 4 Cir., 93 F.2d 767, the claim of the plaintiff based upon the alleged assignment from the bankrupt was denied. At a time when the bankrupt was indebted to the plaintiff for materials furnished it, it was orally agreed that such indebtedness should be paid out of certain distinct "accounts receivable" owing to the bankrupt. The debtors were not notified of the assignment. The court held that, in order to effect an assignment, while no particular phraseology is necessary, the intention to vest the present right in the assignee must appear either by oral or written word or by conduct signifying a relinquishment of control by the assignor and an appropriation to the assignee. The agreement did not constitute an assignment but was merely a promise to pay out of the designated funds, there being no intention manifested to assign or appropriate.

[7, 8] II. The claim that the note was a gift without consideration is disposed of by the findings of the trial court. The postscript upon the note over the signature of the plaintiff to the effect that it was a gift is of no consequence in the face of the court's findings that the note was delivered for a valuable consideration. All of the transactions between the parties, commencing with 1921 to the date of the settlement of the litigation between them, April 25, 1928, were given in evidence and such evidence constituted the basis of the court's findings. The court with propriety received parol evidence of the antecedent transactions between the parties to ascertain the true consideration for the note. Code Civ.Proc. § 1962; Richardson v. Lamp, 209 Cal. 668, 290 P. 14; Gardner v. Watson, 170 Cal. 570, 150 P. 994. "Plaintiff was not estopped by the recitals in the bill of sale with respect to its consideration." Wurdeman v. Waller, 88 Cal. App. 393, 263 P. 558, 559.

[9] But if appellant's contention were sound and all the parol evidence excluded, the adequacy of consideration was established by the original conveyance of a one-third interest in the oil-bearing land; by the $100,000 note of decedent to plaintiff delivered upon plaintiff's quitclaim of said one-third interest, and by the subsequent litigation arising from decedent's attempt to cancel said last-mentioned note and by the written stipulation for its compromise. The compromise of a lawsuit was itself a sufficient consideration for the note. 6 Cal.Jur. 177; Gardner v. Watson, supra.

[10-12] III. The contention of appellant that the provision for the note to be payable out of a specific fund cannot operate as a partial assignment of a larger fund in the absence of a showing of adequate consideration is answered in the foregoing. The filing of the claim against the estate of decedent is immaterial to our consideration. At no time was the contention made by plaintiff that he had any right to receive payment of the balance due on his note from the general estate of the decedent or from any fund other than the portion of the oil royalties conveyed by the note and the order. At the trial the plaintiff specifically waived all rights to any interest in the general estate of the decedent. Since the note was made payable out of the specific funds, it could not constitute a claim against the general estate of the deceased. A claimant of specific property cannot properly be called a creditor and need not present any claim. 11-a Cal.Jur., sec. 504. "One who claims as his own, adversely to an estate, specific property held and claimed by the estate, cannot be called a creditor of the estate, within the meaning of the property law." Estate of Dutard, 147 Cal. 253, at page 256, 81 P. 519, at page 520.

Plaintiff's filing of a claim with the executor was meaningless and its rejection was harmless. Probate Code, §716.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

35 Cal.App.2d 643

BURFORD v. HUESBY et al.

Civ. 10906.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1939.

Rehearing Denied Dec. 28, 1939.

Hearing Denied Jan. 25, 1940.

1. Automobiles ⇨192(1)

The statute imposing liability on automobile owner for its negligent operation by another with owner's "express" or "implied" permission is not limited to cases where owner knows beforehand that driver intends to use automobile. Vehicle Code, § 402, St. 1935, p. 153.

"Express" necessarily implies previous knowledge of intended personal use, and "implied" must mean without such previous knowledge, but under circumstances from which consent to use the automobile is necessarily implied.

[Ed. Note.—For other definitions of "Express" and "Implied," see Words & Phrases.]

2. Appeal and error ⇨931(1)

On appeal by defendant, appellate court was required to resolve conflicts in the evidence in favor of plaintiff.

3. Automobiles ⇨192(1)

Owner of automobile was liable under statute for injuries caused by negligent operation thereof by owner's intimate friend, on ground that the friend was using automobile with owner's "implied permission" within meaning of statute, where owner of automobile had been accustomed to allow others to use his automobile, and on occasion in question owner had promised to take third person home in the automobile, but had fallen asleep, and owner's friend volunteered to take third person home in owner's automobile, and accident occurred while he was doing so. Vehicle Code, § 402, St. 1935, p. 153.

[Ed. Note.—For other definitions of "Implied Permission," see Words & Phrases.]

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by Harry Burford against Oscar Huesby, W. B. Juett, and others to recover damages for personal injuries sustained in an automobile collision. From an adverse judgment, W. B. Juett appeals.

Judgment affirmed.

Charles V. Barfield and John J. Healy, Jr., both of San Francisco, for appellant.

J. Francis Shirley and Joseph W. Robb, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sought damages for personal injuries against defendants, Huesby and Juett, the former being the operator of a certain Dodge automobile involved in the accident, and the latter being the owner thereof. The cause was tried by the court sitting without a jury and from a judgment in favor of plaintiff and against said defendants in the sum of $1,570, defendant Juett appeals.

Defendant contends that the evidence was insufficient to sustain certain findings of the trial court in which it was found that defendant Huesby was acting as the agent of defendant Juett and that defendant Huesby was driving the automobile of defendant Juett with the permission of said defendant Juett. It is conceded, however, that if the evidence was sufficient to sustain the finding that defendant Huesby was driving defendant Juett's automobile with the permission of the latter, the judgment should be affirmed. We are of the opinion that the evidence was sufficient for that purpose and we therefore deem it unnecessary to discuss the question of the sufficiency of the evidence to sustain the finding of agency.

Section 402 of the Vehicle Code (St. 1935, p. 153) imposes liability upon the owner of an automobile when the driver, whose negligent operation of the automobile caused the injury, operated the automobile "with the permission, express or implied, of such owner." It is therefore apparent that the permission may be either express or implied and that evidence showing an implied permission is sufficient to sustain the above mentioned finding and judgment.

[1] Speaking of the word "implied", it is said in Black's Law Dictionary, third edition, page 924, "This word is used in law as contrasted with 'express'; i. e., where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language or the conduct of the parties." Defendant admits that "prior knowledge that the driver intends to so use the car is not necessary to find an implied permission", for as was said in Phipps v. Shacklett, 137 Cal.App. 109, at page 111, 29 P.2d 917, at page 918, "prior knowledge that the driver intends to so use the car is not necessary. That seems to be necessarily implied from the use of the words 'express or implied' in connection with the owner's 'permission.' 'Express' necessarily implies previous knowledge of the intended private use. 'Implied' must mean without such previous knowledge, but under circumstances from which consent to use the car is necessarily implied".

The accident in the present case occurred around 11 p. m. on the highway between Pittsburg and Antioch. Plaintiff was riding in an automobile which was struck by the automobile operated by defendant Huesby and owned by defendant Juett. At that time defendant Huesby was accompanied by his wife and a Mr. Eaby. He was driving from his home in Pittsburg to Antioch, a distance of about five miles, for the purpose of returning Mr. Eaby to Antioch from whence Mr. Eaby had been driven a few hours earlier by defendant Juett. Defendant Juett was not in the automobile at the time but was asleep at the home of defendant Huesby in Pittsburg.

Defendant Juett owned a beer and soft drink parlor in Antioch. He also was a commission salesman for Investor's Syndicate, a concern which sold some form of investors' certificates. Defendant Huesby was the manager of a brokerage company in Pittsburg which company was engaged in the loan business. Said defendants were intimate friends and visited each other frequently. Mr. Eaby had become acquainted with both defendants but was not an intimate friend of either.

Defendant Juett was apparently very liberal in permitting his friends and prospective customers to use his automobile. He testified, "I have always been very liberal that way, tried to help out. Anybody can drive my car if I think they are right. * * * I generally like to have them tell me where they are taking it. * * * Every day it is being done. * * Most every day around my place, someone will come in and say, 'Juett, I have to go up here a block or two, can I use your car'? 'Sure'. * * * They generally come to the door and holler." He further testified that it was his habit to leave his keys in his car. On a previous occasion defendant Huesby had used a truck belonging to defendant Juett. Defendant Juett testified that he knew that defendant Huesby was moving at that time and he thought he "volunteered the truck" for defendant Huesby's use without being asked for it.

[2] There are some minor conflicts in the evidence regarding what was said and done on the evening in question but on this appeal we must resolve these conflicts in favor of plaintiff. It appears that Mr. Eaby met defendant Juett in the latter's

place of business in Antioch on that evening and that said defendant invited Mr. Eaby to take a ride with him to Pittsburg. He testified, "My purpose was to see Huesby on Investors' Syndicate and just meeting Eaby, I thought it was a good time to get acquainted with him, always looking for business." In other words, defendant Juett believed both men were business prospects. Before consenting to go to Pittsburg, Mr. Eaby told defendant Juett that he had to go to work at midnight and defendant Juett assured him that he would get him back. Mr. Eaby left his own car in Antioch and the two men proceeded to Pittsburg and to the home of defendant Huesby in the car of defendant Juett, arriving at about 8 p. m. There they visited with defendant Huesby and his wife, the two defendants conversing together most of the time regarding Investors' Syndicate while Mr. Eaby and Mrs. Huesby had a conversation. There was considerable beer consumed during the evening. Defendant Juett had brought eight pints himself, all of which was consumed. He admitted that he drank a quart of beer at the Huesby home. He had been up all night the previous night, had been drinking beer that afternoon, had not had dinner, and he became sleepy as the evening wore on. On several occasions during the evening, Mr. Eaby mentioned the fact that he had to get back to Antioch in time to go to work. Finally defendant Juett fell asleep on the davenport and Mr. Eaby became very anxious about getting back. Defendant Huesby then undertook to drive Mr. Eaby back in order to avoid the necessity of awakening his good friend from his much needed sleep.

As they left the house, it was noticed that defendant Juett's car partially blocked the driveway in which defendant Huesby's car was parked. The last-mentioned car was seven years old and the headlights were defective. Defendant Huesby said, "We'll take Fat's car," meaning the car of defendant Juett. The keys had been left in the car according to the custom of defendant Juett and the parties started for Antioch in that car, leaving defendant Juett slumbering at the Huesby home. When asked why he did not awaken defendant Juett and request express permission to use the car, defendant Huesby testified, "Well, he was a good friend and he seemed to be very tired and we didn't think it was necessary to do that." Defendant Juett was not awakened until about 1 a. m. when someone was sent to the Huesby home for that purpose after the accident had happened.

Defendant Juett did not criticize defendant Huesby for using the car and upon the trial he testified that such use of his car on the night in question was perfectly agreeable to him. After the accident and before the trial, plaintiff told defendant Juett that he understood said defendant was claiming that defendant Huesby had no permission to use the car. Said defendant replied, "After this accident, I was faced with four damage suits amounting to $75,000. You see what kind of a spot I was in and I had to rely on some out."

[3] In disposing of this appeal, we do not deem it necessary to discuss the question of whether a mere showing of ownership by defendant Juett was sufficient to give rise to an inference of permissive use by defendant Huesby. This question is touched upon but not decided in the recent case of Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, where it was assumed, solely for the purpose of that decision, that such showing was sufficient for that purpose. In the present case there was ample evidence, without resort to such inference, to show that there was implied permission for defendant Huesby to use defendant Juett's car. It appears that defendant Juett made it a general and daily practice of lending his automobiles to his friends for their use; that defendant Huesby was one of his intimate friends; that defendant Juett had previously loaned defendant Huesby an automobile for the latter's use at which time he had "volunteered" it; that on the occasion in question, defendant Juett had taken Mr. Eaby, a friend and business prospect, from Antioch to defendant Huesby's home in Pittsburg upon the promise to get him back to Antioch in time to go to work at midnight; that either through the use of intoxicating liquor or because of lack of sleep or both, defendant Juett had fallen asleep in the Huesby home and it was doubtful, to say the least, whether he was in any proper condition to fulfill his promise to Mr. Eaby; that defendant Huesby was willing to perform that service for defendant Juett and knowing defendant Juett's attitude regarding the use of his car, he felt it entirely unnecessary to disturb defendant Juett from his slumber for the purpose of obtaining express permission. It may be conceded that there was no evidence to show that express per-

mission had been given with prior knowledge of the intended use at the particular time and place, but as indicated by the above-mentioned authorities, it was not necessary to show such express permission or such prior knowledge. Implied permission was sufficient and we are of the opinion that the evidence relating to the conduct of the parties and the circumstances existing at the time fully justified a finding that defendant Huesby had implied permission to use said automobile of defendant Juett for the purpose for which he was using it at the time the accident occurred.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

---

35 Cal.App.2d 581

In re CONKEY'S ESTATE.

VAN DYKE v. CONKEY et al.

Civ. 11887.

District Court of Appeal, Second District. Division 2, California.

Nov. 22, 1939.

Hearing Denied Jan. 18, 1940.

1. Executors and administrators 🔑315(6)

That decree of Massachusetts court distributed to daughter of deceased, her deceased mother's share in trust estate, did not relieve daughter, who was executrix of her mother's estate in California, of duty to hold that portion of the trust estate as executrix, rather than as an individual, and other children of deceased mother, who were pretermitted by mother's will, were entitled at least to a hearing on their claims to heirship. Probate Code, §§ 90, 91.

2. Executors and administrators 🔑469(1)

The superior court of California had jurisdiction to determine duty of executrix toward properties that came into her hands under a decree of a court of foreign jurisdiction.

3. Executors and administrators 🔑1

Executrix was an officer of the court and occupied a fiduciary relation toward all parties having an interest in the estate.

4. Executors and administrators 🔑86(2)

Where executrix conceived that her claim to estate or to distributive share of trust was in conflict with the interests of other heirs, it was her duty to hold the money for the estate, to present the matter frankly to the court, and to abide by its decision, or to retire from her office and engage in an open controversy with all contenders.

5. Executors and administrators 🔑517

Massachusetts court had no authority to deal with an executrix appointed in California as an executrix, since she had no standing in Massachusetts as an executrix.

6. Executors and administrators 🔑465

Court to which executrix presented her final account for approval had duty not only to examine her account but to require her to produce any assets forwarded to her from another state or of which she had taken possession, whether the property was inheritances awarded by a court of a foreign jurisdiction or property acquired from another state without probate in the jurisdiction of its origin.

7. Executors and administrators 🔑86(2)

On receipt by any person of the property of a decedent, it is the duty of such person to deliver the property to the qualified executor of the deceased's estate.

8. Judgment 🔑822(1)

On final account of executrix, who had failed to account for money distributed to her by trustee in another state, pursuant to decree reciting that she was entitled by the will of the deceased to the property, full faith and credit was not involved, since, on executrix' receipt of the property from the trustee, the authority of the California court became supreme with reference both to the estate and to the obligations of the executrix.

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Proceeding in the matter of the estate of Annie Wood Conkey, deceased, wherein Florence A. Van Dyke, executrix, filed a petition for the allowance of her final account, and wherein Fred W. Conkey and Newton M. Todd, administrator with the will annexed of the estate of Annie Wood Conkey, sometimes known as Annie Conkey, deceased, filed a contest. From an order sustaining the objection to her final account, disallowing her account, and requiring her to render a further, full, and complete account, Florence A. Van Dyke appeals.

Affirmed.

Mayock & Lester, of Los Angeles, for appellant.

Fred A. Watkins, of Long Beach, for respondent Newton M. Todd.

John E. Munholland, of Long Beach, for respondent Fred W. Conkey.

MOORE, Presiding Justice.

Appeal by the deposed executrix from an order sustaining the objections of a pretermitted heir to her final account disallowing the account and requiring said executrix to render a further, full and complete account of her administration.

On October 14, 1935, appellant applied for letters testamentary in the estate of her deceased mother, Annie Wood Conkey. In her petition, she alleged: "Petitioner is informed and believes that there is a distributable share in a trust of which the Old Colony Trust Company, Boston, Massachusetts, is trustee, under which Annie Wood Conkey, sometimes known as Annie Conkey, if living, would be entitled. The exact amount of this distributive share petitioner is not now informed."

There was no reason for appellant to qualify as such executrix except to receive from said Old Colony said distributive share for the estate of her deceased mother. The latter had departed this life more than ten years prior to the filing of said petition. Appellant was duly qualified and on November 24, 1936, filed an inventory in which she stated the following: "Amount of money received from the James Barton Wood trust, $7,210.00. As to all of this amount said administratrix Florence A. Van Dyke is not now certain that all of it belongs to the estate of decedent, but anticipates ascertaining shortly for certain whether or not it does, or how much of it does."

On January 20, 1936, she approved a claim filed by her husband in the sum of $6,000 and it was allowed by the court October 9, 1936. On receipt of the money in June of 1936, she deposited it in her personal account. She then opened a bank account as executrix in which she deposited $1,200 of the same money and out of the latter account paid $62.48 on bills of the estate. Also, she paid her husband's claim.

It appears that one James Barton Wood, father of decedent, in his lifetime, created a trust estate with the said Trust Company as trustee for the life benefit of Miriam Wood, with the remainder to others named. The said Miriam having deceased, the said Trust Company petitioned the probate court of Suffolk county, Massachusetts, for a decree distributing the remainder of the estate to the remaindermen named in the trust indenture. Pursuant to said petition, a decree of distribution was made and that part of the decree dated June 18, 1936, pertinent to this case reads as follows: "And that the following persons are entitled to said trust estate in the proportions specified as follows: * * * Florence Van Dyke, who is entitled by will of Annie Wood Conkey, who, as one of the said remaindermen, was entitled to a one-sixth interest—$1/6$—$36/216$."

The trust had been created in Massachusetts by will and had been administered in that state until its said distribution. Appellant contends: (I) That, because the decree distributed to Florence Van Dyke as described in said decree and not to Annie Wood Conkey or her estate, therefore it was intended to award the share to appellant in her individual capacity, and not to the estate of her deceased mother; (II) that the decree is final and is not subject to collateral attack if the Massachusetts court had jurisdiction to make the decree. (III) that, by giving full faith and credit to the Massachusetts decree, its finality is emphasized and the burden rests upon respondent to prove lack of jurisdiction of the Massachusetts court.

[1] (I) Appellant having qualified as executrix of her mother's estate for the sole purpose of receiving for the estate the said distributive share, it was proper for the Trust Company to forward the money to her after the court's distribution of said share to appellant. Her mother "as one of the said remaindermen was entitled to a one-sixth interest". Having opened the succession in California by qualifying as executrix, having made her said declaration in her petition, knowing of the existence of pretermitted heirs and of the origin and nature of the trust, appellant could have had no doubt that the money received by her was her mother's share of the corpus of said trust and that, as executrix, it was her duty to present it in her inventory. As further proof of her own conviction that the money belonged

to her mother's estate, she allowed the claim of her husband for $6,000, caused the court to approve the claim and thereafter paid it out of the money received from the Trust Company. The naming of appellant in the decree of distribution as distributee did not minimize her duty as executrix to conserve the estate for all of its beneficiaries. The proof justifiably satisfied the trial court that the money was received by appellant as executrix of decedent's estate and that it should be treated as an asset of the estate. The very presence of other children of decedent, who were pretermitted by her will, necessarily entitled them at least to a hearing upon their claims to heirship if, indeed, it did not establish definitely their right to participate in the succession. Probate Code, §§ 90 and 91.

[2, 3] II. The finality of the Massachusetts decree is not denied. Its function was accomplished upon its entry and its purpose was achieved on payment of the money to appellant. But there a new chapter opened. The superior court of California has jurisdiction to determine the duty of an executor toward properties that come into his hands even though it be distributed to him by a court of a foreign jurisdiction. In re Roach's Estate, 208 Cal. 394, 281 P. 607; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; Estate of Kelpsch, 203 Cal. 613, 265 P. 214. He is an officer of the court and occupies a fiduciary relation toward all parties having an interest in the estate. 11a Cal.Jur. 75, 76, 77.

[4] When appellant conceived that her claim to the estate or to the distributive share of the trust was in conflict with the interest of other heirs, it was her duty to hold the money for the estate, to present the matter frankly to the court and abide by its decision, or to retire from her office and engage in an open controversy with all contenders. Instead of doing either, after listing the money in her inventory, she proceeded to pay $6,000 of it to her husband, thereby widening the gulf between the legacy and the claimants that might justly be entitled thereto. Apparently because she was named as sole legatee in her mother's will, which was never before the courts of Massachusetts, she undertook a short cut of further disposing of other legitimate heirs by retaining the money through the simple expedient of paying it to her husband. But if she takes under the will, it must undergo probate which protects the rights of pretermitted heirs. Such is this proceeding which was instituted by appellant.

[5, 6] The Massachusetts court had no authority to deal with appellant as an executrix. As such officer in California, she had no standing in Massachusetts. Old Colony Trust Co. v. Clarke, 291 Mass. 17, 195 N.E. 758. But since one-sixth of the remainder of the trust estate was vested in decedent during her lifetime, subject to the terms of the trust, the trustee pursued a course of safety in paying the share to one bearing credentials as executrix of decedent's estate duly appointed by a court of competent jurisdiction. Ibid. It was not only the duty of the court to examine her account (Gainfort's Estate, 11 Cal.2d 298, 79 P.2d 97; Landis v. First National Bank, 20 Cal.App.2d 198, 66 P.2d 730), but to require her to produce any assets (Russell v. Russell, 23 Cal.App.2d 103, 72 P.2d 219) forwarded to her from another state or of which she had taken possession. This applies with equal force to inheritances awarded by the court of a foreign jurisdiction to a California executor as well as to property acquired by such executor from another state without probate in the jurisdiction of its origin. In re Ortiz's Estate, 86 Cal. 306, 315, 24 P. 1034, 21 Am.St.Rep. 44; Estate of Barreiro, 125 Cal.App. 752, 14 P.2d 786.

[7, 8] III. Full faith and credit is not involved. No question exists as to the validity of the decree. It authorized the trustee to pay the share of the remainder to appellant who, at the time, was executrix of the remainderman's estate. Upon receipt by any person of the property of a decedent, it is the duty of such person to deliver the asset to the qualified executor of the estate of such deceased. In re Ortiz's Estate, supra; In re Roach's Estate, supra. Since appellant was herself the qualified executrix of her mother's estate in California where her mother had deceased, the Massachusetts decree became an incident in the chain of events that brought the money into appellant's hands. Upon her receipt of it, the authority of the California court became supreme with reference both to said estate and to the obligation of appellant. Ibidem.

For the reasons indicated, the judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

35 Cal.App.2d 634

INOUYE et al. v. McCALL et al.

Civ. 6273.

District Court of Appeal, Third District, California.

Nov. 27, 1939.

Hearing Denied Jan. 25, 1940.

1. Witnesses ⚷216, 256

In action for motorist's death, wherein a state highway patrol officer, refreshing his memory from memoranda, testified concerning scene of the accident, trial court erred in denying defendants' motion for leave to examine the memoranda on the ground that it represented confidential matter. Code Civ.Proc. § 2047.

2. Witnesses ⚷216

The only reports made under the Vehicle Code, which are confidential, are those made so by the section of the Vehicle Code making accident reports confidential, such as the reports required of the driver, of the occupant, and of the coroner. Vehicle Code §§ 484, 485, 487, 488; St.1935, pp. 172, 173.

3. Appeal and error ⚷1047(5)

In action for death of motorist, trial court's error in refusing to permit defendants' attorney to examine memoranda from which plaintiffs' witness refreshed his memory was not prejudicial error, where witness' entire testimony could have been stricken out without having made any difference in the result of the trial, and every material point brought out by witness was covered by some other witness. Code Civ.Proc. § 2047.

4. Appeal and error ⚷1026

A judgment should not be set aside unless, after examination of the entire cause, including the evidence, the court should be of the opinion that the error complained of resulted in a miscarriage of justice.

5. Witnesses ⚷256

The right given by the Code of Civil Procedure to examine a writing used by a witness to refresh his memory is to protect an adverse party against false, forged, or manufactured evidence, or to aid in developing circumstances that might detract from the weight of the testimony, and is a right to be protected by the reviewing court. Code Civ.Proc. § 2047.

6. Appeal and error ⚷931(1)

On appeal by defendants from a judgment in favor of plaintiffs, testimony would be viewed most favorably to the holding of the trial court.

7. Automobiles ⚷244(43)

In action for death of motorist in collision at intersection when his automobile was struck by a truck which came out into intersection without stopping at arterial highway on which motorist was proceeding, evidence supported finding that motorist was not guilty of contributory negligence which would preclude recovery for his death.

8. Automobiles ⚷206

A motorist who was driving down an arterial highway had the right to believe that the driver of truck on crossroad would stop at the arterial highway and yield to motorist the right of way.

9. Automobiles ⚷171(11)

A truck driver who disregarded the law and failed to stop at arterial highway was in no better position than had he violated the section of the Vehicle Code providing that the driver of a vehicle which has stopped at the entrance of a through highway shall yield the right of way to other vehicles which are approaching so closely on the through highway as to constitute an immediate hazard. Vehicle Code, § 552; St.1935, p. 187.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Fusae Inouye and others, by and through their guardian ad litem, Fusae Inouye, against L. W. McCall, Relv Taylor, and others, to recover for the death in an automobile collision of one who was the husband and father of the plaintiffs. From an adverse judgment, the named defendants appeal.

Judgment affirmed.

Frank V. Campbell and Robert E. Hayes, both of San Jose, for appellants.

Glenn West and Robert H. Rinn, both of Lodi, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

From a judgment entered against appellants for the death of Frank Inouye, the husband and father of plaintiffs, this appeal is prosecuted.

The record discloses, and it is conceded by appellants, that there was substantial evidence to the effect that Relv Taylor, one of the appellants, was operating the truck involved in the accident in a negligent manner at that time and place and that he was then the employee of defendant McCall and was acting within the scope of his employment. It is also conceded that the amount of the award was not excessive.

Two points are urged for a reversal: First, that the trial court committed error in refusing to allow defendants to inspect certain notes and memoranda to which a witness had referred during his direct examination; and, secondly, that the decedent was guilty of contributory negligence.

As to the first point, the record discloses that plaintiffs called to the witness stand Homer F. Raleigh, a state highway patrol officer. On direct examination he was asked as to the time he arrived at the scene of the accident. He answered approximately 2 p. m. Then the following took place:

"Q. Did you make a report that day while you were there? A. Yes, I did.

"Q. And have you that report with you? A. I have.

"Q. Made it in your own handwriting? A. It is.

"Q. Was it made at the time when you examined the intersection and the objects at the intersection? A. Yes.

"Q. Then refreshing your memory from your notes and the report, what time was it when you arrived there? A. Two o'clock, 2 p. m."

The witness then testified at considerable length and some detail as to what he saw at the scene of the accident and located various points upon a map in evidence and gave distances of these points from fixed objects designated on a map in evidence. Upon cross-examination, Mr. Neumiller, one of the attorneys for the defendants, said to the witness:

"May I see that report and diagram? A. You can see the diagram, but don't look at the copy.

"Q. You have been using this report to refresh your recollection today, haven't you? A. Yes, but this on the back of that report is strictly confidential, through the Vehicle Code, St.1935, p. 93 et seq., which states that, and that is not for you to read, Mr. Attorney.

"Mr. Neumiller: If your honor please, I would ask leave to examine this report.

"The witness: That cannot be read, your honor

"Mr. Neumiller: (continuing) from which this witness—

"The court: Your motion will be denied."

Counsel then developed the fact that the report was made out about 9:30 o'clock of the evening of the accident from data obtained at the scene of the collision during the afternoon. Then followed:

"Q. And it is from this report, based upon those original memoranda of yours, that you have given your testimony here today? A. That is right.

"Mr. Neumiller: I renew the motion, if your honor please, that I have the right to see the document from which this witness has refreshed his recollection.

"The court: Motion will be denied."

[1-3] This ruling clearly was error. There is nothing in our statutes making the notes, memoranda or report of a highway patrol officer confidential. Only those reports are confidential which are so made by section 488 of the Vehicle Code and include the report required of the driver, sec. 484, Vehicle Code, the occupant's report, sec. 485, Vehicle Code, and the coroner's report, sec. 487, Vehicle Code. Conceding the ruling of the court was error and assuming that the witness referred to his notes not only to fix the time of his arrival at the scene of the accident, but also to locate upon the map in evidence the relative positions of the various physical objects, we cannot, however, say the ruling was prejudicial. The entire testimony of Raleigh could have been stricken out and it is quite evident it would have made no difference in the result of the trial. Every material point brought out by Raleigh had been covered by some other witness. Raleigh testified he was a member of the highway patrol; that he arrived at the scene of the accident about 2 p. m. of that day. He described the position of the two vehicles, giving various distances in feet and indicating the same upon the map in evidence. He also removed and presented in court two louver strips taken from the Ford being the two metal strips that extend along the hood on the left side of the car. These strips showed yellow paint. He also examined the yellow license plate on the front of the truck and found scratches where the paint had been rubbed off.

Among the other witnesses was a surveyor who prepared an accurate map of the intersection with the physical objects located thereon. Another witness who arrived at the scene of the accident at about 2 p. m. took several photographs of the intersection and the cars in the positions in which they came to rest after the collision. Another witness who arrived somewhat later also took other pictures and also testified as to various marks shown upon the highway.

[4] Ralph B. Sutton, a sergeant of the highway patrol, accompanied Raleigh to the scene of the accident. He testified as to the relative positions of the two vehicles, the marks upon the ground and the apparent points of impact on the Ford. No objection was interposed to the testimony of Sutton, the engineers nor to the two photographers, all of whom seem to have covered the testimony offered by Raleigh. This is a situation for the application of the rule that no judgment should be set aside unless after an examination of the entire cause, including the evidence, the court should be of the opinion that the error complained of resulted in a miscarriage of justice.

[5] While the right to examine a writing used by a witness to refresh his memory given by section 2047 of the Code of Civil Procedure is to protect an adverse party against false, forged or manufactured evidence or to aid in developing circumstances that might detract from the weight of the testimony (Jones Commentaries on Evidence, 2d, vol. 5, p. 4677; Wigmore on Evidence, 2d, vol. 2, p. 762), and is a right to be protected by the reviewing court, we cannot under the circumstances here say defendant has been injured by the ruling complained of. There was no dispute in the testimony as to the physical facts. The evidence of the witness was in effect cumulative, and it is apparent that the error complained of did not result in a miscarriage of justice.

The second point is that the court erred in finding that the deceased exercised ordinary care in the premises, and was not guilty of contributory negligence.

[6] Viewing the testimony most favorably to the holding of the trial court, we find that the deceased was traveling easterly in a Ford coupe along a through highway. Defendant Taylor was operating a truck and trailer some sixty feet in length, loaded with barley, in a southerly direction along a county road intersecting the through highway at right angles. Stop signs were posted at the intersection, requiring all vehicles to stop before entering the through highway. The two vehicles collided approximately ten feet south of the center of the intersection and approximately six feet west of the center line of the through highway, and both came to rest approximately fifty feet south of the intersection in a vineyard to the east of the roadway. The photographs in evidence show the front of the Ford uninjured, but the left center side was crushed in, indicating a terrific blow had been delivered on that side of the Ford. The front of the truck showed marks of having struck the coupe. The testimony of the driver of the truck was conflicting in many particulars, but he admitted he did not stop before entering the intersection. He said he slowed down to from two to four miles an hour at the point of the stop sign and then quickly accelerated his speed into the intersection and was going approximately fifteen miles an hour at the instant of the impact. He also testified that at the moment of impact his foot by mistake struck the accelerator instead of the brake. He admitted seeing the coupe traveling east along the highway when he was about ten feet south of the stop sign. At that time the Ford was less than two hundred feet west of the intersection, traveling approximately forty-five miles an hour.

[7, 8] Upon this testimony we cannot assume that deceased was negligent. He had a right to believe the driver of the truck would obey the law and stop at the arterial and yield to him the right of way. Neither have we any testimony before us that the deceased had not reduced the speed of his car before entering the intersection, for the truck driver after seeing the approaching car of deceased then glanced in the opposite direction for cars approaching from that direction and did not again see the Ford until the instant of the impact.

[9] By section 552 of the Vehicle Code the driver of a vehicle which has stopped at the entrance of a through highway shall yield the right of way to other vehicles which are approaching so closely on the through highway as to constitute an immediate hazard, and surely a driver who has disregarded the law and failed to stop at an arterial is in no better position. Here the deceased, less than two hundred feet away, traveling at an ordinary rate of speed, would constitute an immediate hazard to a slow-moving, heavily-laden truck and trailer.

There is ample evidence to support the finding of the trial court that the deceased was not guilty of contributory negligence, and an examination of the entire record reveals no error of sufficient importance to justify a reversal.

The judgment is affirmed.

We concur: TUTTLE, J.; THOMPSON, J.

---

35 Cal.App.2d 650

THOMAS v. CITY OF BAYSHORE.

Civ. 10713.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1939.

1. Appeal and error 🔑1010(1)

In personal injury action, tried to court without jury, trial court's finding on question of plaintiff's contributory negligence is conclusive on appeal if supported by evidence.

2. Appeal and error 🔑989

An appellate court cannot take the place of trial court for purpose of determining weight of testimony, but it can consider the evidence solely for purpose of determining whether there is any substantial testimony tending to establish facts found.

3. Municipal corporations 🔑819(7)

In pedestrian's action against municipality for injuries allegedly sustained as result of fall on defective sidewalk, evidence supported finding that pedestrian was guilty of contributory negligence in using sidewalk.

4. Appeal and error 🔑1008(1)

In pedestrian's action against municipality for injuries allegedly sustained as result of fall on defective sidewalk, tried to court without jury, whether pedestrian was guilty of contributory negligence because of use of sidewalk with knowledge of its defective and dangerous condition was for trial court.

5. Municipal corporations 🔑805(6)

In pedestrian's action against municipality for injuries allegedly sustained as result of fall on defective sidewalk, doctrine of "forgetfulness of a known danger" had no application, where pedestrian admitted that she was fully mindful of defective condition of sidewalk.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Virginia E. Thomas against the City of Bayshore, a municipal corporation, for injuries allegedly sustained by plaintiff as result of a fall on a defective sidewalk in defendant city. From judgment for defendant, the plaintiff appeals.

Affirmed.

Frank V. Kington, of Redwood City, for appellant.

F. E. Hoffmann, of San Mateo, for respondent.

KNIGHT, Justice.

Plaintiff brought this action to recover damages for injuries she claimed to have sustained as a result of a fall on a defective sidewalk on MacDonald avenue in the defendant city. The action was tried by the court sitting without a jury, and judgment rendered in defendant's favor, from which judgment plaintiff appeals.

The judgment was based on findings to the effect that the sidewalk at the point where plaintiff fell was in a broken and defective condition of which the defendant had knowledge, but that plaintiff also had knowledge of the defective condition thereof; that such condition was notorious and obvious, and that the plaintiff was guilty of contributory negligence in using said sidewalk at the said time and place of the accident. The sole question presented by the appeal is, therefore, whether the evidence is legally sufficient to support the trial court's affirmative finding on the issue of contributory negligence.

MacDonald avenue is part of the MacDonald subdivision, and up to the time of the accident there had been but little building thereon. The sidewalks were put in by MacDonald, who developed the tract, and they were constructed of cement, but the construction was not substantial. There was no foundation to them, and the cement was only about three-eighths of an inch thick, so that eventually, in the block where plaintiff fell and elsewhere along MacDonald avenue, the cement became broken, and pieces of it were gone.

This condition was well known to plaintiff; she lived within a block of the scene of the accident, and had passed up and down the street many times. In fact her husband for some time had been a member of the city council, and on account of complaints made about the condition of the sidewalks an inspection had been made by some of the officials of said city, including her husband, and the council had discussed on numerous occasions ways and means to repair the sidewalks. In fact the evidence shows that plaintiff was present at many of the meetings of the council while her husband was a member thereof, during which the condition of said sidewalks had been discussed. She knew also that about a year prior to her accident another resident of the town had been injured by falling in the block below where she fell. Plaintiff started to walk along the sidewalk about 7 o'clock at night during the month of January. According to her testimony, there had been a slight rain or fog, the street was wet, and it was dark. She admitted that she was familiar with the condition of the sidewalk, and frequently walked in the street rather than on the sidewalk because she knew the sidewalk was unsafe; but she stated that on this particular evening she walked on the sidewalk because she was afraid that if she used the street she would be hit by passing automobiles; and as she proceeded along the sidewalk she fell and was injured. The particular defect which caused plaintiff's fall was a depression, "a straight down break * * * around 12 inches wide and probably 14 inches long running the width of the sidewalk, and from two to three inches deep". She testified that she was walking along quickly, but was attempting to be careful to avoid known defects in the sidewalk, and had avoided other defects up to the point where she fell; that at that point she stepped into the above described break in the sidewalk of which she claimed she was unaware, and fell.

[1-3] In a case such as this, the trial court's finding on the question of plaintiff's contributory negligence is doubtless conclusive on appeal if supported by the evidence, because the question of whether plaintiff was negligent in using said sidewalk at the time and place and under the circumstances present was a question of fact for the determination of the trier of fact (Heath v. Manson, 147 Cal. 694, 82 P. 331); and we are of the opinion that the evidence here supports the finding so made. While there is no substantial conflict in the evidence, it is apparent that different conclusions as to plaintiff's contributory negligence may be reasonably drawn by different minds from the same evidence, and that being so, the conclusion reached by the trier of the fact is controlling. Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078; see, also 2 Cal.Jur., pp. 934-5. As frequently stated, an appellate court may not take the place of the trial court for the purpose of determining the weight of testimony. It may consider the evidence solely for the purpose of determining whether there is any substantial testimony tending to establish the facts found (19 Cal.Jur., pp. 776-7); and in this case, after a careful review of the evidence, we are not prepared to say that the trial court's finding that plaintiff was guilty of contributory negligence in using the sidewalk under the circumstances is without evidentiary support.

[4] Appellant argues that a person is not to be charged with contributory negligence in every case where with knowledge of the dangerous and defective condition of a sidewalk he unavoidably uses the same; and no doubt that is true; but in any such case the questions of whether under the circumstances there present the use of the sidewalk is unavoidable, and if so, whether with the knowledge of the dangerous condition thereof due care is exercised in passing over it, are questions of pure fact for the jury or trial court to determine.

[5] There has been some discussion in the briefs as to the so-called doctrine of "forgetfulness of a known danger", but there is no ground for the application of that doctrine here, because the plaintiff admits that she was fully mindful of the defective condition of the sidewalk before she started to walk on it.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

GONSALVES v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.*

Civ. 6137.

District Court of Appeal, Third District, California.

Nov. 29, 1939.

Hearing Granted Jan. 25, 1940.

1. Banks and banking ⚿134(1)

The right of a bank to proceed against a deposit of a customer for a debt owing the bank is a right of set-off, for it rests upon and is coextensive with the right to set-off as to mutual demands.

2. Dismissal and nonsuit ⚿60(2)

The statute providing for dismissal of action for failure to serve and return summons within three years from commencement of action makes it mandatory upon court to dismiss action where summons is not served and returned within required period. Code Civ.Proc. § 581a.

3. Banks and banking ⚿134(1)
Judgment ⚿745

Where bank's action on demand note dated in 1929 was commenced within four years after note was executed and bank in 1937 attempted to offset amount due on note against maker's deposit before action was dismissed in 1938, pursuant to statute, for failure to serve and return summons within three years after commencement of action, judgment of dismissal, though entered after date of attempted offset, was a judicial determination that on date of attempted offset all right to proceed further with action had been lost by bank, and hence bank had no right to enforce statutory lien for amount of note. Code Civ.Proc. § 581a; Civ.Code, § 3054.

4. Judgment ⚿495(1)

It will be presumed in support of a judgment collaterally attacked that court had jurisdiction both of subject matter and of the person, and all that was necessary to give the court jurisdiction to render judgment was duly found.

5. Banks and banking ⚿143(5)

Evidence was insufficient to entitle depositor to recover damages for withholding of deposits by bank, where agreed statement showed only that depositor was unable to purchase cows for his dairy because of bank's action, and there was no evidence of amount of loss, except that it was stipulated that damages awarded, if any, should not exceed $150.

6. Banks and banking ⚿143(7)

Depositor was not entitled to recover exemplary damages for withholding of deposit by bank, where bank acted upon advice of counsel in belief that it had right of set-off against depositor, and act was without malice. Civ.Code, § 3320.

◆

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action to recover a bank deposit by Joe S. Gonsalves against the Bank of America National Trust & Savings Association, a banking corporation. From a judgment for the full amount of the deposit, defendant appeals, and from judgment disallowing a claim for damages, plaintiff appeals.

Affirmed.

Prior opinion, 94 P.2d 61.

Dennett & Zion, of Modesto, for appellant.

Probasco & McClean, of Oakland, amici curiæ.

Louis Ferrari, Geo. D. Schilling, D. Bianco, and C. H. White, all of San Francisco, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

This is an action to recover the amount of a bank deposit, together with interest thereon, and damages. The trial court rendered judgment for the full amount of the deposit, with interest, but disallowed the claim for damages. Defendant appeals from the judgment against it, and plaintiff appeals from that portion of the judgment which disallows damages claimed by him.

A rehearing was granted for the reason that we have come to the conclusion that the question should not be decided solely upon the effect of the statute of limitations, but upon the question as to whether or not, at the time of the attempted seizure of respondent's bank account under the so-called Bankers' Lien Statute (Civ.Code, § 3054), appellant could have proceeded to judgment upon its claim against respondent.

The stipulated facts are briefly as follows:

On June 18, 1929, Gonsalves and his wife executed a note to the predecessor of the bank in the amount of $5,360, payable on demand, which note was secured by a chattel mortgage. By successorship, the bank became the owner of the note, and on February 15, 1932, the security was sold and the proceeds applied on the note, leaving a balance of $2,338.60. Thereafter, the note was assigned by the bank to one H. C. Winklemen for the purpose of collection and suit; that H. C. Winklemen was the agent and trustee for the bank, and never at any time had any part of the beneficial interest in the note, nor the action predicated thereon. On June 15, 1933, said H. C. Winklemen filed an action on the note against Gonsalves and his wife, in the superior court of the state of California, in and for the city and county of San Francisco. Service of the summons in said action was never effected on the defendants therein.

---

*For subsequent opinion see 105 P.2d 118.

On June 23, 1937, Gonsalves had on deposit in a general commercial account with the Turlock branch of the bank, the sum of $1,306.91. At that time the bank notified him that it would not pay him this sum because of his debt to it in the sum of $2,338.60. Thereafter, and on June 13, 1937, a check signed by Gonsalves was presented for the balance of the account, payment whereof was refused by the bank, because of the claimed right to hold the deposit on account of the above note. On July 29, 1937, the present action was filed in the superior court of Stanislaus county, to recover the amount of his said deposit, and also to recover damages for the failure to pay over the same. The stipulation of facts provides that if plaintiff recovers judgment for the amount of his deposit, the damages shall be limited to $150, if the trial court should determine that damages be allowed. Thereafter, on April 21, 1938, the action of H. C. Winklemen v. Gonsalves et al., in the superior court of the city and county of San Francisco, was dismissed by the said superior court for failure to serve and return summons within three years of the filing of the action, and the San Francisco court further incorporated in its order that the defendants had not been absent from the state of California during said three years.

Appellant bank justifies its refusal to pay the check by invoking the provisions of section 3054 of the Civil Code, which reads as follows: "Banker's lien. A banker has a general lien, dependent on possession, upon all property in his hands, belonging to a customer, for the balance due to him from such customer in the course of the business."

The note was payable on demand, and was admittedly due upon the date when the bank refused payment upon the check drawn upon plaintiff's account.

[1] It is the contention of plaintiff that at the time appellant exercised its purported right to seize the account of plaintiff in satisfaction of the balance due on the note, it had no right of action to a set-off. The right of the bank to thus proceed against the deposit of a customer "is more accurately a right of set-off, for it rests upon, and is co-extensive with, the right to set-off as to mutual demands". 7 Am.Jur. Sec. 629.

On April 29, 1937, pursuant to a motion duly noticed and made, the superior court of the city and county of San Francisco made and entered its order dismissing said last mentioned action, for failure to serve and return summons within three years from the date of the filing of the action, as provided in section 581a of the Code of Civil Procedure. Said order also found that defendant had not been absent from the state during said time. Section 581a of the Code of Civil Procedure reads as follows: "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; provided, that, except in actions to partition or to recover possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the State, or while he has secreted himself within the State to prevent the service of summons on him. All actions, heretofore or hereafter commenced, must be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if summons has been served, and no answer has been filed, if plaintiff fails, or has failed, to have judgment entered within three years after service of summons."

The action was filed June 15, 1933, and the bank account of plaintiff was seized by appellant to satisfy its lien on July 13, 1937, more than four years thereafter. No summons had ever been served on plaintiff during said time, nor had any service been made at the time of the dismissal of the action on April 21, 1938, nearly five years after the action was filed.

[2] The section of the Code of Civil Procedure above quoted has remained the same since 1907. After that date the following rulings have been made in respect thereto. "In 1889 subdivision 7 was added to section 581 of the Code of Civil Procedure. Stats.1889, p. 398. The effect of the subdivision, which, as amended (Stats. 1895, p. 31), was in substance re-enacted in 1907 as section 581a (Stats.1907, p. 712), was to make it mandatory upon the court to dismiss where the summons had not been issued within one year, or served and returned within three years. Vrooman v. Li Po Tai, 113 Cal. 302, 45 P. 470; Swortfiguer v. White, 141 Cal. 576, 75 P. 172." Witter v. Phelps, 163 Cal. 655, 656, 657, 126 P. 593. In the case of Caldwell v. Regents etc., 23 Cal.App. 29-33, 136 P. 731, 732, it is said: "By section 581a of the Code of Civil Procedure it is made mandatory upon the court to dismiss an action in which summons has not been served and return thereon made within three years after the commencement of such action. Bernard v. Parmelee, 6 Cal.App. 537, 545, 92 P. 658, and cases therein cited." And further, as stated in Pearson v. Superior Court, 122 Cal.App. 571-575, 10 P.2d 489, 490: "Upon this state of facts the petitioner's right to a peremptory writ of mandate stands uncontestable. As the owner, or the one entitled to the possession, of the boat, he is a party beneficially interested in the dismissal of the action brought to foreclose a mortgage upon the boat. Section 581a, Code of Civil Procedure, provides that unless the summons shall be served and return thereon made within three years after the commencement of the action, the action must be dismissed on the court's own motion 'or on motion of any party interested therein, whether named in the complaint as a party or not.' Because of the failure to make return of summons within the three-year period, the trial court lost jurisdiction of the case on the very day that period expired, that is, lost jurisdiction to make any other order than a dismissal of the action. 9 Cal.Jur., pp. 533, 534; Swortfiguer v. White, 141 Cal. 576, 579, 75 P. 172; Vrooman v. Li Po Tai, 113 Cal. 302, 304, 305, 45 P. 470; Davis v. Superior Court, 184 Cal. 691, 694, 195 P. 390; Modoc Land Co. v. Superior Court, 128 Cal. 255, 256, 60 P. 848; Donner v. Superior Court, 82 Cal. App. 165, 168, 255 P. 272, where additional cases are cited. In Swortfiguer v. White, supra, it is said on page 579, of 141 Cal., 75 P. 172, 173: 'There having been no service and return made of the summons within three years from the commencement of the action, or appearance within that time by any of the defendants, that action was practically put an end to, and it was the imperative duty of the court to have dismissed it at the expiration of three years from its commencement. * * * The court below thereupon lost all jurisdiction over the cause.'

"Applying the rule of the foregoing decisions to the case at hand we must hold that because of the failure to comply with the provisions of section 581a, Code of Civil Procedure, the trial court lost jurisdiction over that cause on the date when the three-year period expired and that the entry of the judgment in favor of plaintiff upon a return of summons made four years after the commencement of the action was void upon the face of the record for want of jurisdiction; that the trial court then had jurisdiction in that proceeding to do nothing but dismiss the action upon its own motion or upon the motion of a party beneficially interested therein, and that the right of appeal from the order denying petitioner's motion to dismiss is not a speedy nor an adequate remedy. This was so held in Davis v. Superior Court, 184 Cal., 691, 696, 195 P. 390."

It would thus appear that when the bank took over the deposit, the court in which the action against plaintiff was pending had no jurisdiction other than to dismiss the action; and it had therefore lost its right of setoff.

It is contended by appellant that an amendment to this law in 1907 altered the rule existing prior to that date in respect to the showing necessary to invoke it. This amendment reads as follows: "provided, that, except in actions to partition or to recover possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the State, or while he has secreted himself within the State to prevent the service of summons on him."

It is contended that mere lapse of time, which formerly barred all further action, does not now have that effect, owing to the fact that the court must retain jurisdiction thereafter to determine whether or not the defendant, during the three-year period, or any part thereof, was absent from the State or concealed himself to avoid service.

[3, 4] We do not deem it necessary to decide the above question, though it would appear that the cases cited, supra, all construed the statute in its present form, and none of them made any change in the rule to the effect that mere lapse of time ousted the court of all jurisdiction except the power to dismiss the action. We are of the opinion that the judgment of dismissal, although entered after the date of the attempted offset was, in effect, a judicial determination that upon the latter date all right to proceed further with the action had been lost by appellant. By that judgment the court said that no service had been made of the summons within three years after the commencement of the action,—that is, during the period from June 15, 1933, to June 15, 1936,—and that during said time the defendant was not absent from the state, nor had he secreted himself to prevent the service of summons upon him. This follows from the presumptions which are indulged in to support a judgment collaterally attacked. "It will be presumed in such a case that the court had jurisdiction both of the subject matter and of the person, and all that was necessary to give the court jurisdiction to render the particular judgment were duly found." 34 C.J., p. 538. As the attempted right of offset by appellant was exercised almost four years after the action was commenced, its right to proceed further with the action was then barred. The statute specifically provides that it shall not thereafter be "further prosecuted". The bank, having no legal recourse against plaintiff, had for that reason lost all right to enforce a lien under the provisions of section 3054 of the Civil Code.

In view of the foregoing, it becomes unnecessary to discuss the effect of the statute of limitations. If, at the time of the attempted offset, the bank could proceed no further in the pending action against respondent, the same result would follow as in a case where the action is barred by the statute of limitations.

[5, 6] Taking up the appeal by plaintiff, it is contended by him that he is entitled to damages which, under the stipulation above mentioned, are limited to $150. We believe that the trial court correctly held that such damages are not justified by the evidence. The court allowed interest on the amount due from the date the check was refused payment by the bank. The complaint alleges: "That the said plaintiff has suffered damages in the destruction of his credit and financial standing, and injury to his reputation in the sum of Three Thousand Dollars ($3000.00)." The agreed statement of facts states that plaintiff was unable to purchase cows for his dairy business because of the action of the bank, but there is no evidence of the amount of any damage or loss, and the matter is left to conjecture and speculation, save and except that the damages awarded, if any, shall not exceed $150. It is further agreed that the bank acted upon the advice of counsel in the belief that it had the right of setoff. Where the failure by a bank to honor a check is due to mistake or error, and without malice, none but actual damages shall be allowed; consequently, exemplary damages, also claimed under the complaint, are not all allowable. Section 3320, Civ.Code.

The judgment is affirmed. Plaintiff-respondent to recover costs on appeal.

We concur: PULLEN, P. J.; THOMPSON, J.

35 Cal.App.2d 611

In re JUDSON'S ESTATE.

JUDSON v. SOMERS.

Civ. 11228.

District Court of Appeal, First District, Division 2, California.

Nov. 27, 1939.

1. Wills ⚿585(1)

Where will, after specific bequests, bequeathed "one-half of the residue" to daughter and "remaining half" in trust for son, and in event of son's death to his issue, and subsequent paragraph directed payment of monthly sums to son and daughter respectively during period of administration, from property "not specifically devised or bequeathed," son's daughter was entitled to the monthly payment after son's death, as against contention that such payment would be a substitution of son's daughter as beneficiary in her father's place. Probate Code, § 92.

2. Wills ⚿585(1)

Where will, after making specific bequests, bequeathed "one-half of the residue" to daughter and "remaining half" in trust for son, and in event of son's death to his issue, subsequent paragraph directing payment of monthly sums to son and daughter respectively during period of administration, from property "not specifically devised or bequeathed," did not contain a bequest, but contained definite instructions regarding the payment of the residuary bequests to daughter and son. Probate Code, § 92.

◆

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Susan A. Judson, also known as S. A. Judson, deceased, wherein Pearl Judson Somers, as executrix of the last will and testament, filed petition for instruction concerning her duties. From an adverse order, Marietta G. Judson appeals.

Reversed, with directions.

Walter Shelton, David J. McDaniel, A. Terkel, and J. L. Bradley, all of San Francisco, for appellant.

Wesley W. Kergan, of San Francisco, for respondent.

STURTEVANT, Justice.

[1] After the last will and testament of Susan A. Judson, deceased, had been admitted to probate, the executrix filed a petition asking to be instructed as to her duties as executrix in carrying out the instructions of the decedent as contained in the thirteenth paragraph of said will. That paragraph is as follows: "I hereby authorize and direct the executrix or executor of my will, during the administration of my said estate and prior to any distribution thereof, to pay to my said son, Chester W. Judson, and my daughter, Pearl Judson Somers, respectively, *the sum of One Thousand ($1000) Dollars a month from any moneys or property in my said estate not specifically devised or bequeathed.*" (Emphasis ours.) At the time the petition was filed Chester W. Judson was dead, in fact he died before the death of the testatrix. However, he left surviving him his daughter Marietta G. who is at the present time of the age of twenty-four years. After hearing the petition the trial court was of the opinion that it had power to order $1,000 paid to Pearl Judson Somers but that it had no power to order $1,000 paid to the daughter of Chester W. Judson because to do so would be to substitute her as a beneficiary in the place of her father. The court therefore made an order as follows: "It is hereby ordered, adjudged and decreed, that said Pearl Judson Somers, as such executrix, in accordance with the provisions of the thirteenth (13th) paragraph of the last will and testament of said decedent, shall, and she is hereby instructed to pay the sum of One Thousand Dollars ($1000) in each calendar month to herself commencing with the month of July, 1938, and she is further instructed that Marietta G. Judson is not to be paid anything under the provisions of said paragraph of decedent's last will and testament." From that order Marietta G. Judson has appealed. In concluding that an order to pay $1,000 per month to Marietta G. Judson would be to substitute her as beneficiary in the place of her father, we think the trial court erred. The provisions of the will created her rights.

[2] The testatrix died possessed of a fortune of $750,000 or thereabouts. She made a number of specific bequests. After allowing for the payment of all claims, expenses of administration, all estate and inheritance taxes in the probate proceeding, as well as the specific legacies set forth

in the will, the proximate value of the estate is $300,000. Having made said specific bequests, in paragraph six she bequeathed "one-half of the residue" to her daughter Pearl Judson Somers. In paragraph seven she bequeathed "the remaining half" of the residue to Mercantile Trust Company in trust for her son Chester W. Judson. In the event that Chester did not survive her the will provided that the bequest to him should pass to his issue to be paid when such issue attained the age of twenty-five years. It is patent therefore that the testatrix had bequeathed every part and portion of her estate. However, she inserted paragraph thirteen, hereinabove set forth. Reading it in the light of the foregoing provisions of the will, it is clear said paragraph does not contain a bequest but it does contain definite instructions and authority regarding the payment, in monthly instalments, of the bequests made in paragraphs six and seven to the testatrix's daughter and son. These views are reinforced by the last portion of said paragraph thirteen which authorized the representatives of the testatrix to pay "* * * *the sum of $1000 per month from any moneys or property in my said estate not specifically devised or bequeathed*", that is, out of the residue. As to her son, the testatrix inserted spendthrift trust clauses. To her son and to her daughter she bequeathed to each a home. These facts, while not conclusive, lead to the conclusion that the payment to each of $1,000 monthly pending the administration of the estate was for the purpose of maintenance and support. But it is clear that in the event of the death of her son his daughter needed maintenance and support. Nothing is contained in said paragraph nor in any other part of the will showing the payment authorized to be made to the son should not, in the event of his death, be made to his surviving daughter. As recited above other provisions of the will clearly showed the daughter of Chester should, upon his demise, take his estate and furthermore that when she attained the age of twenty-five years the absolute title should vest in her. There is nothing in the will that shows the son's daughter was, in the event her father died before the testatrix, to take less than the estate bequeathed to him.

The views just expressed find full support in section 92 of the Probate Code. In so far as pertinent that section provides: "§ 92. * * * when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, * * * such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator."

Any other construction would lead to the decedent's daughter receiving first, $1,000 per month pending the administration and then, in the language of the will, "one-half of the residue". The will contains no provisions indicating that intention. Furthermore to adopt the construction just mentioned would be in effect to hold that paragraph 13 created an independent bequest out of the estate bequeathed in paragraphs 6 and 7. The will contains no expressions supporting that construction. The same contention was made in Estate of Granniss, 142 Cal. 1, 75 P. 324. On page 6, of 142 Cal., page 326 of 75 P., the court said: "But the gift and bequest to his daughter in the second clause is explicit, and without any words of limitation or qualification, and all the authorities agree that when the absolute estate has been conveyed in one clause of the will it will not be cut down or limited by subsequent words, except such as indicate as clear an intention as would the words used in creating the estate. Words which merely raise a doubt or suggest an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the estate first conveyed." The court then cited many rules. It concluded by stating, in 142 Cal. on page 7, 75 P. on page 326, the following: "It is very plain from these rules of construction that what was said by the testator in item fourth of the will cannot control or in any way affect the plain and explicit declaration contained in the second, wherein he declares that all of the rest, residue, and remainder of his estate, both real and personal, and wherever situated, goes to his daughter, Harriet Granniss Center." See, also, Estate of Farelly, 214 Cal. 199, 4 P.2d 948.

The order appealed from is reversed and the trial court is directed to enter an order not inconsistent herewith.

I concur: NOURSE, P. J.

I concur in the judgment: SPENCE, J.

35 Cal.App.2d 615

AURENZ v. LOS ANGELES RY. CORPORATION et al.

Civ. 11823.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1939.

Hearing Denied Jan. 25, 1940.

1. **Appeal and error** 🔑1170(9)

A judgment will not be reversed for an erroneous instruction unless upon consideration of entire case, including the evidence, it appears that error has resulted in miscarriage of justice. Const. art. 6, § 4½.

2. **Appeal and error** 🔑1195(3)

The effect of reversing judgment on ground of prejudicially erroneous instructions was to make decision on former appeal the "law of the case", if evidence presented at subsequent trial was substantially the same as that elicited at prior trial. Const. art. 6, § 4½.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

3. **Appeal and error** 🔑1195(1)

The "law of the case" extends to all matters without which the first decision could not have been rendered.

4. **Street railroads** 🔑99(1)

Motorist who was struck by street car at intersection had duty of using ordinary care in crossing the intersection.

5. **Appeal and error** 🔑1195(3)

In action for injuries sustained by motorist in collision with street car at intersection, additional evidence offered on third trial *held* not essentially different from that offered on second trial so that decision reversing judgment for defendants on second trial because of prejudicially erroneous instructions was "law of the case" on third trial; effect of decision being to hold evidence sufficient to support verdict should jury return one for plaintiff.

6. **Street railroads** 🔑117(29)

In action for injuries sustained by motorist in collision with street car at intersection, whether motorist was contributorily negligent in failing to look again in direction of street car as she shifted into second gear, after having observed approach of street car upon stopping before entering intersection, was for the jury.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Carrie Aurenz against the Los Angeles Railway Corporation and another for personal injuries. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Joseph Anderson, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for respondents.

YORK, Presiding Justice.

Appellant sued respondent corporation for damages for personal injuries alleged to have been sustained by her in a collision between her automobile and a street car of said corporation, which was being operated by the respondent Cox, said accident occurring on February 28, 1936, at the intersection of Future street and Cypress avenue in the city of Los Angeles. In the first trial of the cause the jury disagreed and in the second trial a verdict was returned in favor of respondents. The judgment which was thereafter entered was reversed on appeal. Aurenz v. Los Angeles Railway Corp., 19 Cal.App.2d 401, 65 P.2d 910. This is an appeal from a judgment of nonsuit rendered at the close of the third trial which was granted upon the ground that appellant was guilty of contributory negligence as a matter of law.

It is here urged by appellant that (1) this appeal is controlled by the law of the case of the former appeal, and (2) independently of the law of the case there is substantial evidence to support a verdict for appellant, consequently, the trial court committed reversible error when it granted respondents' motion for nonsuit.

In connection with her first point, appellant urges that the decision upon the former appeal "implicitly held the evidence sufficient to support a verdict for plaintiff should the jury return one".

In the first appeal (Aurenz v. Los Angeles Ry. Corp., supra), the court said, 19 Cal.App.2d at page 402, 65 P.2d at page 910: "Viewing the evidence most favorable to defendant (Ah Gett v. Carr, 3 Cal.App. 47, 48, 84 P. 458), the facts in the instant case are: Cypress avenue runs in a northerly and southerly direction in the city of Los Angeles where it intercepts Future street, which lies in an easterly and westerly direction. On February 28, 1936, plaintiff while driving westerly on Future street was struck at the intersection by defendant's street car traveling in a southerly direction. As a result of the accident plaintiff suffered serious injuries." The court then proceeded to reverse the judgment in defendant's favor upon the ground that an instruction which was given to the jury was prejudicially erroneous, without making further reference to the evidence educed at the trial of the cause, except as follows: "The giving of an instruction which finds no support in the evidence is improper. Scandalis v. Jenny, 132 Cal.App. 307, 313, 22 P.2d 545; Buttrick v. Pacific Electric R. Co., 86 Cal.App. 136, 139, 260 P. 588."

[1] In applying section 4½ of article VI of the Constitution to the factual situation presented by the case of Shuey v. Asbury, 5 Cal.2d 712, 713, 55 P.2d 1160, 1161, the court there stated: "It is now settled law that a judgment will not be reversed by reason of an erroneous instruction, unless upon a consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of justice. The usual consequence is that there will be no cause for reversal unless the evidence indicates that without such error in the instructions the verdict probably would have been different from the verdict actually returned by the jury." See, also, Wallace v. King, 27 Cal.App.2d 174, 80 P.2d 523; Harkey v. Luckehe, 19 Cal.App.2d 130, 65 P.2d 77; Hoyt v. Southern Pacific Co., 6 Cal.App.2d 49, 44 P.2d 363.

[2] Therefore, in reversing the judgment in favor of the respondent corporation on the ground of prejudicially erroneous instructions (Aurenz v. Los Angeles Ry. Corp., supra), the court undoubtedly considered the entire case including the evidence, and concluded that "without such error in the instructions the verdict probably would have been different from the verdict actually returned by the jury". Shuey v. Asbury, supra. The effect of this would be to make the decision on the former appeal the law of the case if the evidence presented at the instant trial was *substantially* the same as that elicited at the second trial. Penziner v. West American Finance Co., 10 Cal.2d 160, 169, 74 P.2d 252. Or, as stated in Sheets v. Southern Pacific Co., 1 Cal.2d 408, at page 411, 35 P.2d 121, at page 122, "The decision of the court on the former appeal is the law of the case. It was unquestionably so recognized by the trial court and as such is binding on the parties and on this court on this appeal, provided the state of the facts now presented is *substantially* the same as shown on the former appeal. Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 P. 876; Ellis v. Witmer, 148 Cal. 528, 83 P. 800; 2 Cal. Jur. pp. 944, 1042." (Italics added.)

The decision in the former appeal herein holds, 19 Cal.App.2d 401, 65 P.2d 911: "The jury was misinstructed as to the law, in that the instruction required the plaintiff to come to a full stop before attempting to cross defendant's street car track. This is not the law in California. The correct rule is that the traveler is required to exercise only that degree of care and prudence, which men who possess those qualities in an ordinary or average degree use. Clark v. Bennett, 123 Cal. 275, 279, 55 P. 908; Dawson v. San Diego Elec. Ry. Co., 82 Cal. App. 141, 147, 255 P. 215."

[3] "The law of the case extends to all matters without which the first decision could not have been rendered. Davis v. Edmonds, 218 Cal. 355, 23 P.2d 289." Coats v. General Motors Corp., 11 Cal.2d 601, at page 607, 81 P.2d 906, at page 909.

Respondents here urge that in as much as appellant admitted on cross-examination at the third trial that she did not look in the direction of the street car before driving upon the southbound tracks, that the case as presented the third time differs radically from the evidence educed at the second trial. Respondents further contend that certain additional evidence as to the period of time elapsing between the application by the motorman of the air brakes and when they actually became effective had a most important bearing upon the ability of respondents to avoid the accident.

Upon both trials, appellant testified substantially as follows: That she was driving west on Future street and as she approached its intersection with Cypress avenue she stopped her automobile at a point six or seven feet east of the first or easterly rail of the northbound car tracks and looked both ways, but neither saw nor heard anything approaching; that she then shifted into low gear and started across the first track; that when she was "on it" she saw the street car which was then on the other, or north, side of Frederick street (which point it was stipulated was 310 feet north of the intersection in question); that when she was midway between the northbound car tracks and the southbound car tracks, she shifted into second gear, but before she could get over the southbound car tracks the street car struck her right rear fender.

At the second trial, she testified that at the time she shifted into second gear she saw the street car approaching on the southbound tracks at a point "about three-fourths of the block" away; on the third trial she was asked:

"Where were the front wheels of your automobile when you shifted to second gear? A. Possibly in the center of the two, between the two tracks.

"Q. By that do you mean between the northbound tracks and the southbound tracks? A. Yes.

"Q. Did you look to the right at that point? A. No.

"Q. Then when the front wheels of your automobile got over on to the southbound tracks, you looked to the north and saw the street car about 125 feet away, is that right? A. On the first track of the second set of rails.

"Q. That would be the east rail of the southbound track? A. Yes, sir."

Respondents urge "It was upon this admission of plaintiff that she failed to look in the direction of the approaching car before entering upon the tracks that the court granted defendants' motion for nonsuit on the ground that plaintiff was guilty of contributory negligence as a matter of law."

[4] Appellant was required to use ordinary care in crossing the intersection in question. Whether she exercised such care as would have been exercised by a reasonably prudent person in failing to look as she shifted into second gear, is a question upon which reasonable men might differ, particularly in view of the fact that within a moment or two before she had stopped and looked both ways as she attempted to cross Cypress avenue, and had looked again when she was on the northbound car tracks at which time she saw the street car approaching from a distance of 310 feet to the north at a speed which she estimated to be 20 miles per hour.

[5] At the second trial respondent Cox, the motorman who was operating the street car, testified that traveling at a speed of 15 miles per hour it would require approximately 60 to 75 feet to bring his car to a stop. At the third trial, this witness gave additional testimony, in which substantially the same stopping distance was estimated with the further qualification that there is an interval of about one second between the time the brakes are applied and the time when they actually take hold. At both trials this witness testified that he applied the brakes as soon as he saw the automobile, the evidence being in conflict as to the position of the street car when the automobile entered the intersection. At the third trial, it was stipulated that from the time respondent Cox first saw it until the point of impact appellant's automobile traveled 20 feet.

None of this additional evidence pointed out by respondents is essentially different from that received on the second trial, and under the law of the case it was a question of fact for the jury to say whether, considering all of the facts and circumstances presented by the evidence, appellant was guilty of contributory negligence.

[6] It seems to be respondents' theory that the case "is governed by the rule of the steam road", and that appellant "in failing to look in the direction of anticipated danger was guilty of contributory negligence as a matter of law". This same contention was made in the case of Wright v. Los Angeles Railway, Cal.Sup., 93 P.2d 135, 139, in which a collision took place between an automobile and an interurban street car, as in the instant case, and it was there held by the Supreme Court that "the question whether the rule was applicable does not become material, in the instant case, in view of the fact that, according to her testimony, when plaintiff reached the intersection and was about to make the left turn, she *did* stop and look and that at that time she *saw* the street-car (a block away). * * * Obviously, the purpose of the rule—that is, to cause plaintiff to become aware of any possible danger which might exist from the fact that an interurban car or train was approaching and in close proximity to her—was completely accomplished through the fact that after stopping her automobile and looking in the direction from which the street-car of the defendant was approaching the intersection, she not only *saw* the street-car, but also at the same time made an estimate of its distance from the intersection and the rate of speed at which it was traveling. In other words, plaintiff's error, if any, consisted not in a

failure to observe that the street-car was approaching the intersection, but in the making of a poor estimate as to its speed and distance." In the same opinion, the court quoting from the case of Hamlin v. Pacific Elec. R. Co., 150 Cal. 776, 780, 89 P. 1109, stated at page 140 of 93 P.2d: "Manifestly, it is impossible for one driving a vehicle along a street to look in both directions at once, and it should ordinarily be left to the jury to determine, under the circumstances of each particular case, what amount of vigilance was requisite in order to constitute due care."

Independently of the law of the case, the facts and circumstances revealed by the record herein are such that the question of appellant's contributory negligence should have been left to the determination of the jury.

As was said in Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768, "A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.' Newson v. Hawley, 205 Cal. 188, 270 P. 364; Perera v. Panama Pacific Int. Exp. Co., 179 Cal. 63, 175 P. 454; Estate of Sharon, 179 Cal. 447, 177 P. 283; Estate of Gallo, 61 Cal.App. 163, 175, 214 P. 496; 24 Cal.Jur. pp. 912–918."

The decision on the first appeal having "implicitly held the evidence sufficient to support a verdict for plaintiff should the jury return one", as contended by appellant, the trial court was bound thereby and therefore erroneously granted the motion for nonsuit.

For the reasons stated, the judgment of nonsuit is reversed. The appeal from the order denying motion for new trial is dismissed.

We concur: DORAN, J.; WHITE, J.

14 Cal.2d 639

PEOPLE v. PIERCE et al.

Cr. 4239.

Supreme Court of California.

Nov. 24, 1939.

1. Gaming 🔑**68**

The statute permitting wagering on horse races by the pari-mutuel method constitutes an exception to the statute which declares wagering in general illegal. Pen. Code, § 337a; St.1933, p. 1127, and p. 2046, as amended by St.1935, pp. 1586, 1943, and St.1937, pp. 67, 2292.

2. Indictment and Information 🔑**111(1)**

A complaint, information, or indictment need not specifically negative the various exceptions contained in the act describing the offense.

3. Indictment and Information 🔑**111(1)**

An information charging maintenance of an inclosure for purpose of recording and registering wagers on the results of contests did not fail to state a public offense because not showing that offense did not take place within a legal race track inclosure, by the pari-mutuel method, and by persons licensed by the California Horse Racing Board, or that it did not come within any other possible exception specified in Horse Racing Act, since such was a matter of defense to be proved by the accused. Pen.Code, § 337a; St.1933, p. 1127, and p. 2046, as amended by St.1935, pp. 1586, 1943, and St.1937, pp. 67, 2292.

4. Gaming 🔑**75(1)**

A description of the place kept and occupied is not an essential element of offense of conducting a betting establishment. Pen.Code, § 337a; St.1933, p. 1127, and p. 2046, as amended by St.1935, pp. 1586, 1943, and St.1937, pp. 67, 2292.

5. Indictment and Information 🔑**125(28)**

The statute prohibiting the maintenance of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, or inclosure, of any kind, with a book or books, paper or papers, apparatus, device, or paraphernalia, for purpose of registering wagers on contests between men, beasts, or mechanical apparatus, sets forth only the single offense of conducting a betting establishment, and hence an information charging offense in the exact words of the statute is not defective as setting forth more than one offense in the same count. Pen.Code, §§ 337a, 954, 1004; St.1933, p. 1127, and p. 2046, as amended by St.1935, pp. 1586, 1943, and St.1937, pp. 67, 2292.

6. Criminal law 🔑**1167(1)**

Where accused were furnished with a copy of the testimony given before committing magistrate and were, therefore, well-informed as to exact address of place alleged to have been "kept and occupied" and other circumstances surrounding alleged offense of conducting a betting establishment, accused could not claim that any substantial right was prejudiced by reason of any defect in the matter of the form of information filed. Pen.Code, § 337a, subd. 2; §§ 870, 960.

In Bank.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Jack Pierce, Charles Sikora, and Margaret Johnson were convicted of violating statute prohibiting the maintenance of any inclosure with papers and apparatus for purpose of recording wagers in connection with any contest of skill between men, or beasts, and they appeal.

Affirmed.

For prior opinion, see 91 P.2d 150.

Morris Lavine, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., Paul D. McCormick, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

CURTIS, Justice.

Defendants were convicted in the superior court of the county of Los Angeles of the crime of violating subdivision 2 of section 337a of the Penal Code. Said subdivision of said section of the code, reads as follows: "Every person * * * who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof, with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever * * * Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year."

The information which was filed by the district attorney of Los Angeles county, charging defendants with said violation, was in the following language:

"The said Jack Pierce, Charles Sikora, and Margaret Johnson are accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of violation of subdivision 2 of Section 337a, Penal Code of California, a felony, committed as follows: That the said Jack Pierce, Charles Sikora, and Margaret Johnson on or about the 15th day of July, 1938, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously for gain, hire, reward, gratuitously and otherwise, keep and occupy a room, shed, tenement, tent, booth, building, float, vessel, place, stand and enclosure, and any part thereof, with a book and books, paper and papers, apparatus, device and paraphernalia, for the purpose of recording and registering a bet and bets, and purported bet and bets, wager and wagers, and purported wager and wagers, and of selling pools and purported pools, upon the result and purported result, or trial and purported trial, and contest and purported contest, of skill, speed and power of endurance between beasts, to-wit, horses.

"Contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the State of California."

Defendants demurred to said information on the grounds, among others, that (1) the information failed to state a public offense, and (2) the information set forth more than one offense in the same count and therefore did not substantially conform to the requirements of sections 950, 951, 952 and 954 of the Penal Code. The defendants also filed a motion to set aside the information. The demurrer was overruled and the motion to set aside the information was denied. The case was heard by the trial court, a jury trial having been waived. Judgments of conviction were entered and from said judgments, this appeal by defendants, Charles Sikora and Margaret Johnson, has been taken.

The evidence was clear and convincing that the defendants were guilty of a violation of said subdivision of said section, and no claim, therefore, is made that the evidence is insufficient to support the judgment. Appellants concentrate their attack upon said judgment solely upon the ground that the information was so fatally defective as to be insufficient to support the judgment of conviction. They confine their attack upon the information to two major lines of argument.

[1-3] Appellants first argue that section 337a of the Penal Code and the provisions of the Horse Racing Acts (Stats.1933, p. 1127; Stats.1933, p. 2046, as amended by Stats. 1935, p. 1586 and p. 1943, and Stats. 1937, p. 67 and p. 2292), constitute one law and must be read together. With this as a premise, appellants contend that, although prior to the enactment of the Horse Racing Act, the information herein challenged would have constituted the statement of a public offense, subsequent to the enactment of the Horse Racing Act, the information, as it did not specify with particularity the place where the alleged offense took place, and did not show on its face that it was not a place within a legal race track enclosure, failed to state a public offense. The California Horse Racing Act renders permissible and legal wagering on horse races by the pari-mutuel method, by certain persons licensed by the California Horse Racing Board, at certain locations designated by the California Horse Racing Board, at certain designated times. Such wagering constitutes an exception to the provisions of section 337a of the Penal Code which declares wagering in general illegal. People v. Torrey, 16 Cal.App.2d 470, 472, 60 P.2d 900. By a long line of authorities in California, it has been repeatedly held that it is not necessary that a complaint, information or indictment shall specifically negative the various exceptions contained in the act describing the offense. In re Lord, 199 Cal. 773, 250 P. 714; People v. H. Jevne Co., 179 Cal. 621, 178 P. 517; Matter of Application of Lieritz, 166 Cal. 298, 135 P. 1129; Ex parte Hornef, 154 Cal. 355, 97 P. 891;

People v. Torrey, 16 Cal.App.2d 470, 60 P.2d 900; People v. Bill, 140 Cal.App. 389, 35 P.2d 645; People v. Kinsley, 118 Cal.App. 593, 5 P.2d 938. If said act, which formed the basis of the charge against defendants, in fact took place within a legal race track enclosure, by the pari-mutuel method, and by persons licensed by the California Horse Racing Board, or came within any other possible exception specified in said Horse Racing Act, that was a matter of defense to be proved by the defendants. In re Lord, supra; People v. H. Jevne Co., supra; People v. Bill, supra; People v. Moronati, 70 Cal.App. 17, 232 P. 991; People v. Kinsley, supra. It follows that said information stated sufficient facts to constitute a public offense and that appellants' contention to the contrary is wholly untenable.

[4] The second ground advanced by the appellants as a ground for a reversal of the judgments is that subdivision 2 of section 337a of the Penal Code specifies at least eleven different offenses, that is to say, as many offenses as there are places mentioned in said subdivision, and the information by charging a violation of said subdivision of said section in the exact language of the statute, thereby charged more than one offense without separating the various offenses into separate counts as required by section 954 of the Penal Code. Section 954 of the Penal Code provides that, "An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts * * *." One of the grounds of demurrer specified by section 1004 of the Penal Code is "that more than one offense is charged, except as provided in section nine hundred and fifty-four". If it be true, therefore, that said subdivision of said section sets forth more than one offense, the information was defective in form, and the demurrrer thereto on that ground should have been sustained. However, we are satisfied from an analysis of said subdivision that it sets forth only the single offense of conducting a betting establishment. The gravamen of the offense charged in said subdivision of said code section is the *keeping* and *occupying* of any place, whether structure or enclosure, for the purpose of illegal wagering. The type of place occupied is wholly and utterly immaterial to the offense charged as it makes no practical difference whether the place kept was a booth or a building, a tent or a tenement. It is obvious that the legislature in enacting said subdivision of the code section, instead of using a single word which would define all possible structures and enclosures, merely enumerated various general types of ordinary structures and enclosures, intending thereby to specify any and all possible places. Parenthetically speaking, we are satisfied that the keeping and occupying of any place or edifice, even if not specifically designated in said subdivision of said section, as for instance, a cabin, cottage, house, or yard, would be illegal and a violation of subdivision 2 of section 337a of the Penal Code. In other words a description of the place kept and occupied is not an essential element of the offense.

[5] Since 1927, it has been permissible under the authority of section 952 of the Penal Code to charge the offense in the language of the statute. Said code section specifically provides that: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. *It may be in the words of the enactment describing the offense or declaring the matter to be a public offense,* or in any words sufficient to give the accused notice of the offense of which he is accused. * * *"

There can be no doubt that the rules of pleading with reference to criminal charges have been liberalized by the amendments of 1927 and 1929 relating to pleading in criminal cases. In People v. Beesly, 119 Cal.App. 82, 6 P.2d 114, 970, the court said: "The sufficiency of an indictment or information is not to be tested by the rule of the common law nor by the rules which existed prior to the amendments of 1927 and 1929 of our statutes relating to pleading in criminal cases. The true rule can be determined only by a consideration of all of the statutes affecting the subject as they exist since those amendments. The purpose of an indictment or information is to inform the accused of the charge which he must meet at the trial. At common law, where this information came solely from the indictment, much particularity was required. * * * As a part of the accusatory procedure, the law now provides that in every case the accused is entitled to a copy of the testimony given before the grand jury or the committing magistrate, as the case may be (sections 870, 925, Pen. Code), and he is today better informed as to the case he must meet than was an accused under the detailed form of pleading required at common law. By section 959 of the Penal Code as amended in 1927 (St.1927, p. 1041), we have the statutory provision that an information is sufficient if it can be understood therefrom that it is entitled in a court having authority to receive it, that the defendant is named, or, if his name is not known and that fact is pleaded, he may be charged by a fictitious name, that the offense is one of which the court has jurisdiction, and that the offense was committed prior to the filing of the information. The former requirements of subdivisions 6 and 7 of section 959, that the act or omission charged must be clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended and to enable the court to pronounce judgment upon conviction, were repealed by the 1927 amendment and are no longer a part of that section. In so far as section 950 of the Penal Code seems to conflict with the rule laid down by section 959 as amended, the latter section must control in view of the evident intent of the Legislature to remove the former requirements of subdivisions 6 and 7 by their repeal. Section 952, which formerly required the pleading to set forth the particular circumstances of the offense charged, as amended, declares that it shall be sufficient if it be 'in any words sufficient to give the accused notice of the offense of which he is accused.' There, in a nutshell, is stated the principle of our present simplified form of pleading a criminal offense—the accused is entitled to notice of the offense of which he is charged but not to the particular circumstances thereof, such details being furnished him by the transcript of the testimony upon which the indictment or information is founded."

In view of our conclusion that subdivision 2 of section 337a of the Penal Code states but a single offense, there is no doubt that the district attorney was entitled under the authority of section 952 of the Penal Code to charge the defendants with a violation of said subdivision in the exact words of the statute, and there is no fatal defect in the form of the information as claimed by appellants.

[6] Moreover, as pointed out in People v. Beesly, supra, appellants were required, by the provisions of section 870 of the Penal Code, to be furnished with a copy of the testimony given before the committing magistrate, and were, therefore, well informed as to the exact address of the place alleged to have been "kept and occupied", and other circumstances surrounding the alleged offense. This being so, no possible claim can be made that any "substantial right of the defendant upon the merits" was prejudiced "by reason of any defect or imperfection in matter of form" of the information filed. In view of the definite provisions of section 960 of the Penal Code, in the absence of any possible prejudice, the information cannot be held to be defective. Said code section expressly provides that: "No indictment, information, or complaint is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits."

While holding the information sufficient and free from any legal defect sufficient to justify a reversal of the judgments, we are not to be understood as commending it as a model of pleading to be followed in the future in prosecutions instituted under said subdivision of said section, or under similar statutes.

The judgments are affirmed.

We concur: HOUSER, J.; SHENK, J.; EDMONDS, J.; KNIGHT, Justice pro tem.; SPENCE, Justice pro tem.; PULLEN, Justice pro tem.

14 Cal.2d 800

PEOPLE v. SIKORA et al.

Cr. 4240.

Supreme Court of California.

Nov. 24, 1939.

Rehearing Denied Dec. 22, 1939.

1. Indictment and Information 🔑111(1)

An information charging the maintenance of an inclosure for purpose of recording and registering wagers on the results of contests did not fail to state a public offense because not showing that offense did not take place within a legal race track inclosure, by the pari-mutuel method, and by persons licensed by the California Horse Racing Board, or that it did not come within any other possible exception specified in Horse Racing Act, since such was a matter of defense to be proved by the accused. Pen.Code, § 337a, subd. 2.

2. Indictment and Information 🔑125(28)

The statute prohibiting the maintenance of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, or inclosure, of any kind, with a book or books, paper or papers, apparatus, device, or paraphernalia, for purpose of registering wagers on contests between men, beasts, or mechanical apparatus, sets forth only the single offense of conducting a betting establishment, and hence an information charging offense in the exact words of the statute is not defective as setting forth more than one offense in the same count. Pen.Code, § 337a, subd. 2.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Charles Sikora and Margaret Johnson were convicted of violating statute prohibiting the maintenance of any inclosure with papers and apparatus for purpose of recording wagers in connection with any contest of skill between men or beasts, and they appeal.

Affirmed.

For prior opinion, see 91 P.2d 150.

Morris Lavine, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for respondent.

PER CURIAM.

[1, 2] By information identical in form with the information filed in the case of People v. Pierce, Cal.Sup., 96 P.2d 784, Crim. No. 4239, except that the date of the alleged offense was set forth as August 13, 1938, instead of July 15, 1938, the defendants herein, two of whom are the same defendants as those convicted under the other information, were charged with a violation of subdivision 2 of section 337a of the Penal Code. Upon a trial before the court, presented solely upon the transcript of evidence taken before the committing magistrate, two of the defendants, Charles Sikora and Margaret Johnson, were found guilty and judgments of conviction were entered against them. Carrie Johnson, the other defendant, was found, "not guilty". From the judgments entered against them, the defendants Charles Sikora and Margaret Johnson, have taken this appeal. They advance as grounds for a reversal the same reasons advanced by them in the case of People v. Pierce, Cal. Sup., 96 P.2d 784, Crim. No. 4239. Upon the authority of said case of People v. Pierce, Cal.Sup., 96 P.2d 784, Crim. No. 4239, this day decided contrary to the contention of appellants, the judgments herein are affirmed.

---

14 Cal.2d 679

PEOPLE v. POCIASK.

Cr. 4241.

Supreme Court of California.

Nov. 30, 1939.

1. Automobiles 🔑357

In trial for negligent homicide while driving automobile, court properly instructed jury that, although district attorney waived prosecution except on theory of negligent driving, defendant's otherwise unlawful acts might be considered in determining whether his conduct was negligent. Vehicle Code, § 500, St.1935, p. 173.

2. Automobiles 🔑344

The words "driving in a negligent manner," as used in statute declaring person causing another's death by driving vehicle in negligent manner guilty of negligent homicide, does not mean criminal negligence, as defined in court opinions holding that there must be some measure of wantonness, flagrant or reckless disregard of others' safety, or willful indifference to constitute such negligence. Vehicle Code, § 500, St.1935, p. 173; Pen.Code, § 20.

3. Criminal law 🔑11

In determining what constitutes criminal negligence, court must apply appropriate definition enacted by Legislature, and it is necessary to look to meaning thereof as understood in common law only when Legislature has not properly defined term. Pen. Code, § 20.

4. Statutes 🔑188

The Supreme Court will not add to words of pertinent statutes any formulæ clearly not included within plain language thereof.

5. Criminal law 🔑5

The Legislature may make laws defining what breaches of public peace shall be punishable, specify various degrees of same crime, and require different measure of punishment for each.

6. Criminal law 🔑808½

In trial for negligent homicide committed while operating automobile in negligent manner, trial court need not do more than state law to jury in language of applicable statutes specifying lesser degree of punishment for homicide committed in doing unlawful act not amounting to felony while operating vehicle or driving in negligent manner than for homicides otherwise committed in doing such acts or without due caution and circumspection. Vehicle Code, § 500, St.1935, p. 173; Pen.Code, § 192.

7. Automobiles 🔑356

What amounts to lack of due caution and circumspection in cases of involuntary manslaughter, committed in doing lawful acts, or driving of vehicle in negligent manner within statute declaring person causing another's death by such driving guilty of negligent homicide, are questions for jury to decide according to particular facts. Vehicle Code, § 500, St.1935, p. 173; Pen.Code, § 192.

8. Automobiles 🔑357

In trial for negligent homicide, committed while driving automobile in negligent manner, defendant's requested instruction that negligence, which must be found to establish guilt, is such as would amount to flagrant and reckless disregard of others' safety and willful indifference to possible injury, or consist of doing of lawful act in culpably reckless manner, was properly refused as containing erroneous definition of criminal negligence. Vehicle Code, § 500, St. 1935, p. 173; Pen.Code, § 20.

9. Automobiles 🔑357

In trial for negligent homicide, committed while driving automobile in negligent manner, court properly instructed jury that decedents' negligence in operating bicycles without rear reflectors was no defense and would exonerate defendant only if it were sole proximate cause of accident, but that he was not exonerated if jury found him guilty of negligence proximately contributing to decedents' injuries. Vehicle Code, § 500, St.1935, p. 173.

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Alexander A. Pociask was convicted of negligent homicide, and he appeals.

Affirmed.

Prior opinion, 91 P.2d 199.

Jerry Giesler, Thornwell Rogers, and S. Ward Sullivan, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Burdette J. Daniels, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHENK, Justice.

The defendant was convicted of negligent homicide, a felony, as provided in section 500 of the Vehicle Code. He has appealed from the judgment and from the order denying his motion for a new trial.

Between 8 and 9 o'clock on the evening of September 8, 1938, the defendant, in the company of three other persons, was driving a Ford automobile along Colorado place toward its intersection with Colorado boulevard in Los Angeles county. It was a clear, moonlight night. The lights on the defendant's automobile were burning brightly. There was no traffic coming toward the defendant. Suddenly an object appeared in front of him at a distance of about 80 to 100 feet. He attempted to swerve the car to the right. He felt an impact and heard a scream. The car crossed a wooden curb, hit a post, and came back to the highway. Skidmarks showed that it was stopped 115 feet from the point of impact. The car struck Gladys Schmidt and John Robert Allen, both of whom died as a result of injuries thus sustained. The decedents were on bicycles, traveling along the right-hand side of the highway, in a party with three others who were ahead of them. The bicycles carried no reflectors. A reflector was fastened on a clip attached to a strap around Allen's leg. The defendant's speed at the time was estimated at thirty or thirty-five miles an hour. Earlier in the day the defendant drank a can of ale. He purchased about a dozen cans of ale and a bottle of sloe gin which were taken by his party to a barbecue, but there is evidence that the defendant did not drink at the barbecue. However, the odor of liquor was noticeable on his breath at the police station after the accident, although he did not appear to be intoxicated. The defendant was driving without an operator's license. He had recently theretofore been refused a license because of his failure to pass the eye test. There was some evidence that the brakes on the defendant's car were not in good condition.

Section 500 of the Vehicle Code, added in 1935, Stats.1935, pp. 173, 2141 provides as follows: "When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to felony, the person so operating such vehicle shall be guilty of negligent homicide, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or in the State prison for not more than three years."

[1] The district attorney waived any charges of violations of other provisions of the Vehicle Code and submitted the People's case on the theory that the defendant was guilty of negligent homicide pursuant to said section 500, committed in the doing of a lawful act, that is, while driving an automobile, in a negligent manner. Pursuant to such waiver the court instructed the jury generally that a verdict of guilty on a charge of negligent homicide, that is, while driving an automobile in a negligent manner, may be returned if the jury should find that the defendant was guilty of negligence resulting from a failure to exercise ordinary care under all of the facts and circumstances. The court also instructed the jury that although the district attorney waived any prosecution except on the theory of driving in a negligent manner, nevertheless, all acts of the defendant which might otherwise have constituted unlawful acts might be taken into consideration for the purpose of determining whether the conduct of the defendant was negligent. In other words the court properly guarded against a misapprehension on the part of the jury that any such unlawful acts on the part of the defendant were to be entirely excluded from its consideration.

[2-4] The defendant assigns prejudicial error in the refusal of the court to give requested instructions to the effect that the negligence which must be found before guilt attaches under said section 500 of the Vehicle Code is such negligence as would amount to a flagrant and reckless disregard of the safety of others and a wilful indifference to possible injuries, or consist of the doing of a lawful act in a culpably reckless manner.

The basis of the defendant's request is asserted to be in the provision of section 20 of the Penal Code, as follows: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." The defendant relies on People v. Hurley, 13 Cal.App.2d 208, 56 P.2d 978; People v. Driggs, 111 Cal.App. 42, 295 P. 51, 53, and on decisions from other jurisdictions which define "criminal negligence" in accord with his contentions.

The Driggs case, decided in 1931, involved a charge of assault with intent to commit murder. The facts showed that the defendant, a special police officer guarding a freight train, attempted to frighten away a group of men by firing over their heads. In doing so, a bullet struck and injured another man, a distance of 1,200 feet away, whose presence was not noticed by the defendant. In instructing the jury on the question of what constituted criminal negligence the court read section 7 of the Penal Code, which provides in subdivision 2: "The words 'neglect,' 'negligence,' 'negligent,' and 'negligently' import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." The District Court of Appeal held that, although found in the Penal Code, the definition was only of an act which fixed civil liability; that "in order to constitute criminal negligence, there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others, or willful indifference. If no one of these elements enter into the act, the person charged cannot be held guilty of criminal negligence." The court cited as its authority the cases noted in volume 2, Words and Phrases, first series Criminal Negligence, page 1750, and Volume 1, Words and Phrases, second series, Criminal Negligence, page 1153. In the Hurley case, decided in 1936, the defendant while driving a Cord sedan at night collided with and killed a pedestrian who was walking in the same direction on the right-hand side of the road. A question before the District Court of Appeal was whether the evidence supported a conviction on the charge of involuntary manslaughter. The court considered the provisions of section 192 of the Penal Code defining involuntary manslaughter as the unlawful killing of a human being without malice "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection". The court held that lack of due caution and circumspection must be construed as the equivalent of criminal negligence. Although it cited prior decisions of this court on the subject of what is a lack of due caution and circumspection in cases of involuntary manslaughter, it followed the definition of criminal negligence announced in the case of People v. Driggs, supra, and concluded as a matter of law that the defendant was guilty only of a want of ordinary care which, relying on the Driggs case, it held was insufficient to constitute criminal negligence.

The defendant herein urges that the words "driving in a negligent manner", as those words are used in the pertinent section of the Vehicle Code, read in conjunction with section 20 of the Penal Code, mean criminal negligence as defined in the Driggs and Hurley cases. Such, however, is not the law of this state. True, in every crime there must exist the union of act and intent or criminal negligence. But, in answering the question of what constitutes criminal negligence, the court is bound to apply an appropriate definition enacted by the legislature. Only when the legislature has not properly defined a term is it necessary for the courts to look to the meaning thereof as understood in the common law. 8 R.C.L., p. 60. Section 500 of the Vehicle Code makes criminal, that is, punishable (volume 2, Words and Phrases, First Series, Criminal, page 1741), the negligent driving of a motor vehicle which causes injuries to another proximately resulting in death within the time specified in the section. This court has consistently refused to add to the words of pertinent statutes any formulæ clearly not included within the plain language thereof. At least as early as People v. Pearne, 118 Cal. 154, 50 P. 376, a case of involuntary manslaughter resulting from negligently driving a team of horses, the court held that on the facts the charge to the jury "should rest upon the commission of an act done without due caution and circumspection", employing the language of section 192 of the Penal Code. In denying a hearing in this court after decision by the District Court of Appeal in People v. Seiler, 57 Cal.App. 195, 207 P. 396 (conviction of manslaughter growing out of the negligent driving of an automobile), this court expressly disapproved the use of the words "wanton" and "reckless", and indicated the inaptitude of the word "culpable", in describing the idea to be conveyed by the phrase, "without due caution and circumspection" used in the statute.

In the case of People v. Wilson, 193 Cal. 512, 226 P. 5, 7, the charge of manslaughter also arose out of the negligent driving of an automobile. This court discussed the question of what want of due caution and circumspection is required to constitute criminal negligence. After noting the remarks of this court on denying the petition for hearing in the Seiler case, it was said: "The proper rule deducible from the cases cited in the note above referred to [note following report of Johnson v. State, 66 Ohio St. 59, 63 N.E. 607, in 61 L.R.A. 277, 90 Am.St.Rep. 564] would seem to be this: That when a person is doing anything dangerous in itself, or has charge of anything dangerous in its use, and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances and the death of another results therefrom his act or neglect is a criminal act against the person so killed even though his negligence does not amount to a wanton or reckless disregard of human safety or life. Johnson v. State, supra, and notes; Reg. v. Doherty, 16 Cox's Crim.Law Cases, 306, Morris v. State, 35 Tex.Cr.R. 313, 33 S.W. 539." The foregoing pronouncement has been applied in the following cases: People v. Anderson, 58 Cal.App. 267, 208 P. 324; People v. Thomas, 58 Cal.App. 308, 208 P. 343; People v. Crossan, 87 Cal.App. 5, 261 P. 531; People v. Marconi, 118 Cal.App. 683, 5 P. 2d 974; People v. Frantz, 138 Cal.App. 499, 32 P.2d 670. Anything in the Driggs and Hurley cases inconsistent therewith must be deemed to be disapproved.

Decisions in other jurisdictions relied upon by the defendant, such as People v. Angelo, 246 N.Y. 451, 159 N.E. 394; Cain v. State, 55 Ga.App. 376, 190 S.E. 371; State v. Patterson, Idaho, 88 P.2d 493; French v. State, 235 Ala. 570, 180 So. 594, either involve dissimilar statutory provisions or apply the rule relied upon by the defendant as the common-law rule applicable in the absence of statutory definition. For instance, in the case of State v. Patterson, supra, the defendant was charged with assault with a deadly weapon. A statute in Idaho contains the same requirement as our Penal Code, section 20. The question involved was: What constituted criminal negligence in such a case? See, also, People v. Vasquez, 85 Cal.App. 575, 259 P. 1005. It may also be noted that a statute of Idaho defines involuntary manslaughter in substantially the same language as section 192 of our Penal Code, and which, in cases of manslaughter occurring while driving an automobile in a lawful manner but "without due caution and circumspection", has received an application similar to the approved cases in this state hereinabove cited. State v. Brooks, 49 Idaho 404, 288 P. 894, 896. In that case the court said: "The Legislature has the power to declare what the law shall be on the subject, and, its definition of the offense of involuntary manslaughter having been stated to the jury, in effect, the law upon that point was sufficiently covered, and it was not error for the court to refuse to amplify thereon", citing, among other cases, People v. Fowler, 178 Cal. 657, 174 P. 892, and People v. Seiler, supra.

Exhaustive research has been made into the question of what constitutes criminal negligence under the common law and as applied under statutes in other jurisdictions. See People v. Angelo, supra; note to Johnson v. State, supra; appendix to article, "Negligent Homicide", 25 Calif. Law Rev. 1, 37. There is no controlling authority which would permit this court to apply any other rule or definition than that declared by the legislature and, with but slight and uncontrolling exception, recognized and followed in this state.

Since the enactment of section 500 of the Vehicle Code, convictions on charges of negligent homicide have been upheld where the evidence disclosed the injuries resulting in death were caused by a failure to exercise ordinary care. People v. Pryor, 17 Cal.App.2d 147, 61 P.2d 773; People v. Warner, 27 Cal.App.2d 190, 80 P.2d 737, 739. In the last cited case the court expressly rejected the contention that the evidence must disclose facts indicating something more than ordinary negligence. It stated that "it was only necessary to prove, other than the jurisdictional facts as to time and place, that the appellant was driving a motor vehicle in a negligent manner and that such driving resulted in the death of the person therein named". The result in such cases appears to be harmonious also with section 195 of the Penal Code, which provides that homicide is excusable when it is committed by accident and misfortune in the doing of a lawful act by lawful means, with usual and ordinary caution and without any unlawful intent. A petition for hearing in this court filed in each of the two last-cited cases was denied. A petition for hearing was granted in the present case for the purpose of resolving the inconsistency deemed to have been created by the decisions in the Driggs and Hurley cases.

[5-7] It is within the function of the legislature to make laws defining what breaches of the public peace shall be made punishable. Accordingly it may specify various degrees of the same crime and require a different measure of punishment for each. It is apparent that by the enactment of section 500 of the Vehicle Code the legislature has specified a lesser degree of punishment when the homicide is committed in the doing of an unlawful act not amounting to a felony while operating any vehicle, or while driving in a negligent manner, than is meted out in the cases of homicides otherwise committed in the doing of an unlawful act not amounting to felony or without due caution and circumspection. Sec. 192, Pen.Code. When the legislature has so spoken and the court has stated the law to the jury in the language of the applicable statutes, it is not required to do more. People v. Fowler, supra; People v. Anderson, supra. Therefore, what may amount to a lack of "due caution and circumspection" in cases of in-

voluntary manslaughter committed in the doing of a lawful act, or what may constitute the driving of a vehicle "in a negligent manner", are questions to be decided by the jury according to the particular facts in each case guided by appropriate instructions from the court. The practical difficulties of obtaining a conviction in automobile homicide cases arising under section 192 of the Penal Code may have been the incentive for the enactment of section 500 of the Vehicle Code. That is, in order to foster greater care in the operation of such dangerous instrumentalities, the legislature may have afforded a means by which appropriate punishment may be imposed upon all who have caused death through a breach of duty of due care in such operation.

[8] We conclude that the court did not err in refusing the requested instruction which contained a definition of criminal negligence not in accord with the foregoing views as to the requirements of instructions in cases of negligent homicide as defined by section 500 of the Vehicle Code.

[9] The contention is also made that the failure of the decedents to equip their bicycles with rear reflectors was a proximate cause of the injuries resulting in death. The court correctly instructed the jury in substance that negligence of the decedents was no defense; that such negligence would exonerate the defendant only if it was the sole proximate cause of the accident, but that the defendant was not exonerated if the jury found that he was guilty of negligence which proximately contributed to the injuries. People v. Marconi, supra; People v. McKee, 80 Cal.App. 200, 251 P. 675; note, 67 A.L.R. 922, 29 Cor.Jur. 1155, and cases cited; 13 R.C.L., pp. 749, 750.

The judgment and the order are, and each is, affirmed.

We concur: CURTIS, J.; HOUSER, J.; KNIGHT, SPENCE, and PULLEN, Justices pro tem.

EDMONDS, Justice (dissenting).

I cannot join in the conclusion of my associates that negligence of the persons struck by the appellant's automobile would exonerate him only if it was the sole proximate cause of the accident.

It appears that after the jurors had considered the case for some time, they returned to the courtroom and the foreman stated they had been unable to agree because "one member feels that negligence has something to do with it". To this the trial judge replied, "It has absolutely nothing to do with it and I made that plain to you in my instructions. * * * There is only one basis upon which you can consider the negligence of the decedents, and that is if it is the sole and only cause of the accident."

Of course, the negligence of one killed in a traffic accident is not a defense to prosecution for negligent homicide as defined in section 500 of the Vehicle Code. However, under that section, the operator of a vehicle is only criminally responsible "when the death of any person ensues * * * as the proximate result of injuries caused by the driving of [such] vehicle in a negligent manner * * *." And testimony of the decedent's negligence, though not the sole cause of an accident, has a legitimate place in the evidence upon which the trier of fact is to determine whether a defendant was driving "in a negligent manner". As the District Court of Appeal declared in a recent case, although the contributory negligence of a deceased is no defense in a prosecution for manslaughter, it may have an important bearing on the degree of culpability of one charged with that offense. People v. Hurley, 13 Cal.App.2d 208, 56 P.2d 978. In other words, it may be determinative of the question whether, under all the circumstances and conditions existing at the time of the accident, the defendant operated his car with due care and circumspection.

The authorities are reviewed in 5 American Jurisprudence, page 930, where it is said: "The familiar rule that contributory negligence of the person injured or killed by the negligence of the defendant in the operation of an automobile bars a recovery in a civil action, has no application to a prosecution for homicide due to criminal negligence in operating an automobile. In such case, the decedent's behavior may have a material bearing upon the question of the defendant's guilt, but if the culpable negligence of the latter is found to be the cause of the death, he is criminally responsible whether the decedent's failure to use due care contributed to the injury or not. In some cases, the conduct of the decedent is material to the extent that it bears upon the question whether, under all the circumstances of the case, the defendant was negligent." (Citing cases.)

Another writer discusses the subject as follows: "The general rule of the criminal law that contributory negligence, unless considered as an element of proximate cause, is no excuse for or defense to crime, applies in prosecutions for homicide caused by the negligent operation of motor vehicles. * * * Except as it may be noted hereafter, it is generally held that the contributory negligence of the decedent is no defense, excuse, or justification for the homicide. * * * The conduct of the deceased, however, is material in a prosecution of this nature to the extent that it bears upon the negligence or wrongful conduct of the accused, or on the issue whether the conduct of the accused was the proximate cause of the death of the deceased." (Huddy's Cyclopedia of Automobile Law, vol. 9, p. 83, sec. 43.)

In reversing the conviction of an automobile driver who was charged with manslaughter, the supreme court of Tennessee declared that the contributory negligence of the boy who was killed would not relieve the defendant of the consequence of his unlawful act, Copeland v. State, 154 Tenn. 7, 285 S.W. 565, 566, 49 A.L.R. 605. "But the conduct of the boy was entitled to consideration in determining whether, under the circumstances, Copeland's negligence was the proximate cause of death, or whether death resulted from an unavoidable accident. * * * Allowance must always be made for misadventure and accident, as distinguished from culpable negligence." The same conclusion was reached in State v. Custer, 129 Kan. 381, 282 P. 1071, 1079, 67 A.L.R. 909. The trial court instructed the jury that contributory negligence was not available as a defense in a criminal prosecution for homicide in the operation of an automobile but that evidence of contributory negligence of the victim was admitted "for whatever it may be worth to you as material evidence bearing upon the question of the defendant's guilt". Upon appeal, the court said that the act of the deceased in getting under the rear of an automobile standing at night on the traveled part of the highway without a red light, was a circumstance to be considered by the jury in determining whether death was or was not caused by unlawful driving, although his conduct did not of itself relieve the defendant of liability. Later the same court said: "Contributory negligence on the part of the deceased is not a defense to a charge of manslaughter. It is only a circumstance determining whether it was or was not caused by the unlawful conduct of the defendant." State v. Pendleton, 144 Kan. 410, 61 P.2d 107, 109.

So, also, in Held v. Commonwealth, 183 Ky. 209, 208 S.W. 772, the court decided that although the decedent's negligence was not available to the defendant by way of defense, it was relevant and competent on the question of whether the defendant was negligent in the operation of the vehicle, and thereby unintentionally committed the homicide.

From the discussion between the foreman of the jury and the judge, it appears that except for the instruction concerning contributory negligence on the part of the persons killed in the accident, the appellant would not have been convicted. Under these circumstances, in my opinion, there has been a miscarriage of justice entitling the appellant to a new trial. Const., sec. 4½, art. VI.

---

14 Cal.2d 690

PEOPLE v. BECKHARD.

Cr. 4261.

Supreme Court of California.

Nov. 30, 1939.

Homicide ⚷329, 340(3)

In prosecution for negligent homicide, defendant could not complain of alleged conflict between instruction defining ordinary negligence and instructions defining criminal negligence, which were given at defendant's request and were unduly favorable to defendant inasmuch as criminal negligence was not required to be shown. Vehicle Code, § 500, St.1935, p. 173.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Arthur J. Beckhard was convicted of negligent homicide by causing death while negligently driving an automobile, and he appeals.

Affirmed.

Prior opinion, 93 P.2d 158.

W. Ward Sullivan and Jerry Giesler, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHENK, Justice.

In this case, as in the case of People v. Pociask, this day decided, Cal.Sup., 96 P.2d 788, the question for determination was the propriety of the instructions given by the court defining the word "negligent" as used in section 500 of the Vehicle Code, St.1935, pp. 173, 2141, making the crime of negligent homicide a felony. A hearing was granted in this case after decision by the District Court of Appeal, Second District, Division Two, for the reason that the question involved herein was also presented in People v. Pociask, supra, a case then pending and undetermined in this court. Our decision in the Pociask case follows the reasoning and conclusions of the District Court of Appeal in the present case and is determinative of the contentions of the parties herein. The following portion of the opinion of the District Court of Appeal in this case, prepared by Mr. Acting Presiding Justice Wood, is adopted as our opinion herein, 93 P.2d 158:

"Defendant was charged in count I of the information with the crime of negligent homicide, in violation of section 500 of the Vehicle Code, in that he caused the death of Frank Coleman Joyce, while negligently driving an automobile. In count II the same charge was made except that defendant was accused of causing the death of Patricia Marian Kelly. Verdicts of guilty were returned on both counts and defendant appeals from the order denying his motion for a new trial.

"It was established at the trial that on August 27, 1938, defendant was driving an automobile on Sunset Boulevard in Los Angeles and struck the two decedents when they were walking across the boulevard in the pedestrian's marked cross-walk. Two or three cars were ahead of the car driven by defendant and the two pedestrians stopped to let them pass and as they proceeded defendant's car struck them. Since no claim is made that the evidence is insufficient to support the verdict finding defendant guilty of the offense set forth in section 500 of the Vehicle Code it will be unnecessary to set forth the circumstances in detail.

"Defendant contends that the court erred in giving to the jury the following instruction: 'Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.' At the request of defendant the court gave to the jury a number of instructions defining criminal negligence, among them the following: 'Criminal negligence in degree goes so far beyond that negligence merely which suffices to impose a civil liability for damages as to constitute it criminal negligence for which the party guilty of it may be held criminally liable. In other words, in order to constitute criminal negligence there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others, or wilful indifference, and if no one of these elements enters into the act the person charged cannot be held guilty of criminal negligence.' It is argued that these instructions are conflicting, that the instruction given at the request of defendant states the rule applicable correctly and that a reversal should be ordered since it cannot be determined which instruction the jury followed.

"The section of the Vehicle Code under which defendant was convicted provides: 'When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to felony, the person so operating such vehicle shall be guilty of negligent homicide, * * *.' By the enactment of this section the legislature defined a crime different from any of the crimes which had been defined in any of the various provisions of the Penal Code.

"Defendant is not in position to complain of the fact that the instructions actually given may have been conflicting, for the condition was brought about by his own request. Moreover, he did not suffer prejudice by reason of the giving of any of the instructions, some of which were more favorable to him than he could legally demand. (People v. Suesser, 142 Cal. 354 [75 P. 1093].)"

The order is affirmed.

We concur: CURTIS, J.; EDMONDS, J.; HOUSER, J.; KNIGHT, SPENCE, and PULLEN, Justices pro tem.

14 Cal.2d 704

CARPENTER, Insurance Commissioner, v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA et al.

L. A. 17175.

Supreme Court of California.

Dec. 2, 1939.

As Modified on Denial of Rehearing Dec. 28, 1939.

1. Courts 🔑114, 116(3)

The courts of record in the state have inherent power to make a correction, nunc pro tunc or otherwise, of clerical errors and misprisions in their records, in order that such records conform to the facts and speak the truth.

2. Courts 🔑116(5)

Under rule that courts of record may correct clerical errors and misprisions in their records, the corrections may be made at any time, either on motion of an interested party, or on the court's own motion.

3. Courts 🔑116(5)

Where correction of record by trial court on its own motion was purely that of a clerical error, notice thereof to parties to proceeding was unnecessary, and parties could not be deemed to have been prejudiced by trial court's order made without notice.

4. Judgment 🔑304

A judicial error may not be corrected by trial court under the guise of rectifying a "clerical error."

[Ed. Note.—For other definitions of "Clerical Error," see Words & Phrases.]

5. Judgment 🔑304

A trial judge who has made a decision in which error appears in record has full power in the first instance to determine whether error is a clerical or judicial error, and his conclusion, in the absence of a clear showing to the contrary, is final.

6. Judgment 🔑323

In rehabilitation proceeding by state insurance commissioner against insolvent insurance company, a purported order of dismissal was a "clerical error," which trial judge was authorized to correct without notice to the parties, where trial judge, in making nunc pro tunc order correcting record, stated that no order of dismissal had been made, and purported order of dismissal was incongruous and bore no relevancy to the surrounding recitals.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Rehabilitation proceeding by Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, against the Pacific Mutual Life Insurance Company of California, wherein William H. Neblett, Vernon Bettin, William George Dickinson, Charles Ross Cooper and others, were represented. From order of the trial court correcting its minutes, nunc pro tunc, William H. Neblett, Vernon Bettin, and William George Dickinson appeal. Motion filed by the Insurance Commissioner to summarily affirm the order.

Order affirmed.

Neblett, Warner & MacDonald and Bettin, Painter & Wait, all of Los Angeles, for appellants William H. Neblett, Alfred F. MacDonald, Vernon Bettin and George Dickinson.

Earl Warren, Atty. Gen., Hester Webb, of San Francisco, and Mitchell, Silberberg, Roth & Knupp, of Los Angeles, for respondent Rex B. Goodcell, Insurance Commissioner.

Overton, Lyman & Plumb, O'Melveny, Tuller & Myers, and Asa V. Call, all of Los Angeles, for respondent Pacific Mut. Life Ins. Co. of California.

Hugh K. McKevitt, of San Francisco, for respondents Charles Ross Cooper et al.

Rupert B. Turnbull, of Los Angeles, for respondents Rupert B. Turnbull, Francis Adams et al.

Manierre & Cuthbertson, of Los Angeles, for respondents George W. Manierre and B. Robert Getts.

Kenyon F. Lee, of Los Angeles, for respondents E. B. Tilton et al.

H. S. Dottenheim, of Los Angeles, for respondents Marshall D. Hall and Joseph C. McManus.

Neil S. McCarthy, of Los Angeles, for respondents Ralph R. Huesman, Broadtown Inv. Co., and Neil S. McCarthy.

W. B. Etheridge, of Pasadena, for respondents Dr. Arthur B. Allen et al.

Delvy T. Walton, of Los Angeles, for respondents David Lynn Openshaw et al.

Albert E. Coger, of Los Angeles, for respondent Henry B. Senn.

Herbert Freston, of Los Angeles, in pro. per.

Carl C. Katleman, of Los Angeles, for respondents Carl C. Katleman et al.

Andrew J. Copp, Jr., of Los Angeles, in pro. per.

Garnet C. Rainey, of Los Angeles, for respondent Ralph C. Hamlin.

Chapman & Chapman, of Los Angeles, for respondents Rowe, Sanderson et al.

Hahn & Hahn, of Pasadena, for respondents Robert Casamajor et al.

Ben S. Hunter, of Los Angeles, in pro. per.

M. W. Purcell, of Los Angeles, for respondents Clara M. Garuman et al.

John P. Oliver, in pro. per.

Loeb, Walker & Loeb, of Los Angeles, for respondents Harold S. Cook et al.

Jacob J. Lieberman and Aaron B. Rosenthal, both of Los Angeles, for respondents Robert J. Webb and Philip M. Klutznick.

Lawler & Felix, of Los Angeles, for respondent R. Rabinowitz.

Roscoe R. Hess and David R. Rubin, both of Los Angeles, for respondent Roscoe R. Hess.

Chapman, Snider, Duke & Landis, of New York City, Hiram W. Johnson, Jr., of San Francisco, and Frank P. Doherty, of Los Angeles, for respondents G. C. Parsons, J. A. Marvin and G. R. Snider et al.

Rex Hardy, of Los Angeles, for respondents Austin O. Martin and Rex Hardy.

Ivan Merrick, of Seattle, Wash., for respondent William A. Sullivan.

Arthur E. White, of Los Angeles, in pro. per.

Oscar Lawler and Harold Judson, both of Los Angeles, for respondents George I. Cochran et al.

Shattuck, Davis & Story, of Los Angeles, for respondents Wilbur A. Beckett et al.

Paul Overton, of Los Angeles, for respondent Arthur D. Wunner.

Latham, Watkins & Bouchard, of Los Angeles, for respondents C. N. Wesley et al.

Bell, Boyd & Marshall, of Chicago, Ill., and Newlin & Ashburn, of Los Angeles, for respondents Wilbur G. Katz et al.

William M. Rains, of Los Angeles, for respondents Edwin Janss et al.

D. M. Ellison, of Baton Rouge, La., for respondent E. A. Conway, Secretary of State of Louisiana.

Cosgrove & O'Neil, of Los Angeles, for respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

A. A. Carmichael, Atty. Gen. of Alabama, and Frank E. Spain, Sp. Asst. Atty. Gen. of Alabama, for respondent J. Parker Evans.

SHENK, Acting Chief Justice.

This is a motion by the petitioner, the Insurance Commissioner of this state, to affirm, summarily, an order of the trial court correcting its minutes, nunc pro tunc.

In 1936, the petitioner, acting under authority conferred by statute, took over the business and assets of The Pacific Mutual Life Insurance Company of California. A plan was formulated for liquidation and rehabilitation of the company, which plan contemplated among other things a sale and transfer of assets to a new corporation of similar name. On July 22, 1936, pursuant to the provisions of the Insurance Code, St.1935, p. 496, and in furtherance of the plan of rehabilitation, the commissioner instituted a special proceeding wherein he applied for an order approving the plan and appointing himself as conservator of the company. The new corporation filed a petition in intervention. On July 22d the order prayed for was made, the petition for intervention was granted, and the commissioner took possession of the business and assets of the company. A question arose as to disqualification of the judge who made the order of July 22d. On August 11, 1936, the commissioner applied for and procured from a different trial judge, Judge Willis, an order reappointing the commissioner as conservator and approving the rehabilitation plan. Subsequently, the rehabilitation plan was carried into operation. In lieu of a more detailed statement of facts, reference is hereby made to Carpenter v. Pacific Mutual Life Insurance Co., 10 Cal.2d 307, 74 P.2d 761; Neblett v. Carpenter, 305

U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182; Carpenter v. Pacific Mutual Life Insurance Co., 13 Cal.2d 306, 89 P.2d 637. These decisions were uniform in declaring the lawfulness of the orders approving the plan and furthering its execution.

Early in 1939, the attention of some of the parties interested in the proceeding was directed to the minutes of the trial court of August 11, 1936, and particularly to the purported order of dismissal incorporated in and italicized in the following copy of said minutes:

"Matter re appointment of Conservator etc. in accordance with section 1011 of the Insurance Code, St.1935, p. 540, also comes on for hearing. * * * Attorney Flynn presents an order for appointing conservator. S. L. Carpenter and Albert H. Mowbray are sworn and testify and are cross-examined. Respondent's Exhibit 'A' in this hearing (Copy of Resolution of Defendant Company) is admitted and filed. The application and petition, in accordance with section 1011 of the Insurance Code, is ordered granted by the Court and Order for same filed. *Matter is dismissed without prejudice.*"

The purported order of dismissal was not included in the voluminous records on the prior appeals to this court above noted; nor was it brought to the attention of the Supreme Court of the United States in Neblett v. Carpenter, supra.

After its discovery, and on March 3, 1939, the commissioner petitioned the trial court, Judge Willis presiding, for an order to show cause why a correction should not be made in the minutes of August 11th, by deleting therefrom the words, "Matter is dismissed without prejudice". The order to show cause was issued returnable before Judge Willis on March 20, 1939, but before the return date and on March 17, 1939, Judge Willis, of his own motion, entered a nunc pro tunc order making the correction, and also entered an order vacating the order to show cause and dismissing the proceeding in which it was issued.

The appellants seek a reversal of the order of correction on the ground that the evidence is insufficient to justify the order. In support of the motion for a summary affirmance of the order, it is contended that the appeal fails to present any substantial question. This contention must be sustained.

[1-3] It is the long-settled rule that courts of record in this state have inherent power to make a correction, nunc pro tunc or otherwise, of clerical errors and misprisions in their records, in order that such records conform to the facts and speak the truth. Kohlstedt v. Hauseur, 24 Cal.App.2d 60, cases cited page 62, 74 P.2d 314, page 315; Livesay v. Deibert, 3 Cal. App.2d 140, 39 P.2d 466; Lauchere v. Lambert, 210 Cal. 274, 291 P. 412; 7 Cal.Jur., p. 613, sec. 28; 4 Cal.Jur.Supp., pp. 432 et seq. Under this rule the corrections may be made at any time, either on motion of an interested party, or on the court's own motion. In the present proceeding it was not improper for the court to make the correction prior to hearing of the order to show cause. Since the correction was purely that of a clerical error, notice thereof to the appellants was unnecessary and they may not be deemed to have been prejudiced by the order made without notice.

In the case of Kohlstedt v. Hauseur, supra, it is said [24 Cal.App.2d 60, 74 P.2d 315]: "The respondent contends that the court did not have jurisdiction to make the orders amending the judgment ex parte. The law is that the court may make the correction ex parte and of its own motion. Crim v. Kessing, supra [89 Cal. 478, 26 P. 1074, 23 Am.St.Rep. 491]; Lauchere v. Lambert, supra; Livesay v. Deibert, 3 Cal.App.2d 140, 39 P.2d 466, 469. In the case of Livesay v. Deibert, supra, the Court of Appeal said: 'Appellant makes the further claim that the court could not make the order ex parte, but only on motion after notice given. This view, however, is contrary to the settled rule that the court not only has the power but is also under the duty, upon its own motion, to correct such mistakes when they are called to its attention. Robson v. Superior Court, 171 Cal. 588, 154 P. 8.'"

[4, 5] Appellants urge that the error was judicial and not clerical, and that therefore the trial court was without power to correct it. If the error was in fact judicial, this point would be well taken, as judicial error may not be corrected by a trial court under the guise of rectifying a clerical mistake (see cases above cited). However, the trial judge has full power in the first instance to determine the character of the error, and his conclusion, in the absence of a clear showing to the contrary, is final. Quoting again from Kohlstedt v. Hauseur, supra, 24 Cal.App. 2d at pages 62, 63, 74 P.2d at page 315: "It is for the judge who made the original

decision to decide whether the judgment as written expresses his decision. Kaufman v. Shain, supra [111 Cal. 16, 43 P. 393, 52 Am.St.Rep. 139]; Kowalsky v. Nicholson, supra [23 Cal.App. 160, 137 P. 607]. In acting upon the matter the judge is exercising one of the functions of his judicial office, and he will not direct the amendment unless he is satisfied that the original entry does not clearly express the order which was made. Kaufman v. Shain, supra. In the case of Livesay v. Deibert, supra, the court further said: 'It was for the trial judge to determine whether the order was complete and all that he intended it to be or whether it was deficient. If the mistake was clerical, it could be corrected. If it was judicial, it could not be. It must be presumed that he found it to be his own clerical error; otherwise he would have had no right to make the second order. The facts were completely and solely within his own knowledge. He alone knew whether a mistake had been made and how it had been made. He had a right to rely upon his own memory (King v. Emerson, supra [110 Cal.App. 414, 288 P. 1099, 294 P. 768]), and his determination of the fact is conclusive. People v. Curtis, 113 Cal. 68, 45 P. 180; Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 52 Am.St.Rep. 139; Harman v. Cabaniss, 207 Cal. 60, 276 P. 569."

[6] In the present proceeding the record fully supports the conclusion that the error was a clerical one. The bill of exceptions contains a statement of facts which are not controverted and which reads in part as follows: "On August 11, 1936, in the afternoon of said day, certain proceedings were had herein in the above entitled Court, Honorable Henry M. Willis, Judge presiding, and referred to in said Minutes of August 11, 1936; and said Honorable Henry M. Willis, Judge presiding, retained on March 17, 1939, and still retains an independent recollection of the substance of said proceedings. Said Honorable Henry M. Willis, Judge presiding, during the course of said proceedings took and preserved and still preserves full bench notes which reflect the substance of said proceedings and reflect the fact that no other proceedings were then had. Neither on August 11, 1936, nor at any other time, did the Insurance Commissioner herein or his counsel or the respondent corporation or its counsel make or file or join in any written or oral request or consent or stipulation or motion for the dismissal of the proceedings then pending herein, or any part or portion thereof, and no such request, consent, stipulation or motion appears in the records or files herein, and neither on August 11, 1936, nor at any other time, did the court make, issue, render, or order, any dismissal or order or direct a dismissal, of the proceedings then pending therein, or any part or portion thereof; and said Honorable Henry M. Willis, Judge presiding, so recalled on March 17, 1939, and still so recalls. No notation of any such dismissal as is referred to in said Minute Entry was made in the Register of actions herein."

The order signed by Judge Willis of March 17, 1939, correcting the minutes of his court nunc pro tunc as of August 11, 1936, after recitals not necessary to be repeated, proceeds as follows:

"And it being known to the undersigned judge of said court, who heard and determined said matter and proceeding, and it being within said judge's own memory and knowledge that no order or direction of dismissal of said matter or proceeding was made by the court at said time or at all, and that said matter of application for appointment of conservator was not dismissed and was not ordered dismissed.

"Therefore, on the court's own motion and to make such minutes to speak the truth, it is ordered that the minutes of said department of this court entered on said date of August 11, 1936, be and the same are hereby corrected nunc pro tunc, by striking therefrom at the end thereof the words: 'Matter is dismissed without prejudice'."

Following the recitals in the bill of exceptions, the bench notes of Judge Willis are set forth, together with a certified copy of the reporter's transcript of the proceedings had at the afternoon session of August 11, 1936. In none of this data is there any intimation of a dismissal of the proceeding. The evidence as a whole leaves no room for a conclusion other than that the words of dismissal crept into the clerk's minute entry as a result of inadvertence and clerical error. Indeed even without this persuasive showing it appears on the face of the minute order itself that the purported direction of dismissal is incongruous and bears no relevancy to the surrounding recitals. The trial judge's determination that the error was clerical is therefore fully supported by the record.

There is nothing in our opinion in Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89, which would justify a different conclusion herein. This is not a case where the only conclusion which could be drawn from the record is that the error was a judicial as distinguished from a clerical error.

Appellants' further contention that all proceedings had and taken after the entry of the purported order were void, because the action had been dismissed, fails with the holding that there was in fact no dismissal.

The order appealed from is affirmed.

We concur: CURTIS, J.; HOUSER, J.; CARTER, J.; GIBSON, J.; PULLEN, Justice pro tem.; TUTTLE, Justice pro tem.

WASTE, C. J., and EDMONDS, J., did not participate on rehearing.

---

14 Cal.2d 711

CARPENTER, Insurance Commissioner, v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA et al.

L. A. 16182, 16221, 16222, 16245, 16246.

Supreme Court of California.

Dec. 2, 1939.

Appeal and error 🔑1218

Motions to recall remittiturs after their issuance pursuant to final judgment on ground that a purported order of dismissal of proceeding as contained in minute entry rendered void all proceedings and orders taken thereafter, including final judgments of Supreme Court on appeal, were denied, where trial judge made nunc pro tunc order striking purported order of dismissal from record as a clerical error, and such order was affirmed by Supreme Court.

◆

In Bank.

Rehabilitation proceeding by Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, against the Pacific Mutual Life Insurance Company of California, wherein William H. Neblett, Vernon Bettin, William George Dickinson, Charles Ross Cooper and others were represented. From order entered, William H. Neblett, Vernon Bettin and William George Dickinson appeal. On motions to recall remittiturs after their issuance pursuant to final judgment.

Motions denied.

William H. Neblett, E. Walter Guthrie, A. H. McCurdy, Bettin, Painter & Wait, and Alfred F. MacDonald, all of Los Angeles, for appellants.

Neblett, Warner & MacDonald, William H. Neblett, R. Dean Warner, LeRoy B. Lorenz, and W. Walter Guthrie, all of Los Angeles, for appellant and respondent William H. Neblett.

Bettin, Painter & Wait, of Los Angeles, for appellants and respondents Vernon Bettin and William George Dickinson.

Alfred F. MacDonald, of Los Angeles, in pro. per.

U. S. Webb, Atty. Gen., John J. Flynn, Deputy Atty. Gen., Frank L. Guerena, of San Francisco, and Shepard Mitchell and Mitchell, Silberberg, Roth & Knupp, all of Los Angeles, for petitioner and respondent Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

O'Melveny, Tuller & Myers and Overton, Lyman & Plumb, all of Los Angeles, for respondent Pacific Mut. Life Ins. Co. of California.

Hugh K. McKevitt, of San Francisco, for respondents Charles Ross Cooper et al.

Rupert B. Turnbull, of Los Angeles, for respondents Rupert B. Turnbull et al. for themselves and for other noncancellable policyholders similarly situated and for Francis Adams for himself and for other noncancellable policyholders similarly situated.

Manierre & Cuthbertson, of Los Angeles, for respondents George W. Manierre and B. Robert Getts on their own behalf and on behalf of all similarly situated policyholders.

Kenyon F. Lee, of Los Angeles, for respondents E. B. Tilton et al.

H. S. Dottenheim, of Los Angeles, for respondents Marshall D. Hall and Joseph C. McManus on behalf of themselves and other holders of noncancellable income policies.

Neil S. McCarthy, of Los Angeles, for respondents Neil S. McCarthy on his own behalf, Ralph R. Huesman and Broadtown Investment Co.

W. B. Etheridge, of Pasadena, for respondents Dr. Arthur B. Allen et al.

Delvy T. Walton, of Los Angeles, for respondents David Lynn Openshaw et al.

Albert E. Coger, of Los Angeles, for respondent Henry B. Senn.

Herbert E. Freston, of Los Angeles, in pro. per.

Jacob J. Lieberman and Aaron B. Rosenthal, both of Los Angeles, for respondents Robert J. Webb and Philip M. Klotznick for themselves and all other persons similarly situated.

Lawler & Felix, of Los Angeles, for respondent R. Rabinowitz.

Roscoe R. Hess and David R. Rubin, both of Los Angeles, for respondent Roscoe R. Hess.

Chapman, Snider, Duke & Landis, of New York City, Hiram W. Johnson, Jr., of San Francisco, and Frank P. Doherty, of Los Angeles, for respondents G. C. Parsons, J. A. Marvin and G. R. Snider et al. on behalf of themselves and all other holders of noncancellable policies, and as members of a protective committee for holders of noncancellable income policies.

Rex Hardy, of Los Angeles, for respondents Austin O. Martin and Rex Hardy.

Ivan Merrick, of Seattle, Wash., for respondent William A. Sullivan, Insurance Commissioner of State of Washington.

Arthur E. White, of Los Angeles, in pro. per.

Oscar Lawler and Harold Judson, both of Los Angeles, for respondents George I. Cochran et al.

Shattuck, Davis & Story, of Los Angeles, for respondents William A. Beckett et al.

Paul Overton, of Los Angeles, for respondent Arthur D. Wunner.

Latham, Watkins & Bouchard, of Los Angeles, for respondents C. N. Wesley et al.

Bell, Boyd & Marshall, of Chicago, Ill., and Newlin & Ashburn, of Los Angeles, for respondents Wilbur G. Katz et al.

Carl C. Katleman, of Los Angeles, for respondents Carl C. Katleman et al. for himself and all others similarly situated.

Andrew J. Copp, Jr., of Los Angeles, in pro. per.

Garnet C. Rainey, of Los Angeles, for respondent Ralph C. Hamlin.

Chapman & Chapman, of Los Angeles, for respondents Rowe Sanderson et al.

Hahn & Hahn, of Pasadena, for respondents Robert Casamajor et al.

Ben S. Hunter, of Los Angeles, in pro. per.

M. W. Purcell of Los Angeles, for respondents Clara M. Garunan et al.

John P. Oliver, in pro. per.

Loeb, Walker & Loeb, of Los Angeles, for respondents Harold S. Cook et al.

William M. Rains, of Los Angeles, for respondents Edwin Janss et al.

D. M. Ellison, of Baton Rouge, La., for respondent E. A. Conway, Secretary of State of Louisiana.

Cosgrove & O'Neil and John N. Cramer, all of Los Angeles, for respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

A. A. Carmichael, Atty. Gen., of Alabama, for respondents J. Parker Evans, on behalf of himself and all other holders of active life noncancellable income policies issued in the State of Alabama who may wish to join with him in the proceeding.

Ray Howard, of Los Angeles, for Percy A. Eisen.

Henry Huntington, of Los Angeles, for Wales MacPerdue and Harry B. Robinson.

PER CURIAM.

In the above-numbered cases of the same title, motions have been made to recall the remittiturs after their issuance pursuant to final judgment. The main ground on which they were made is that the purported order of dismissal of the proceedings as contained in the minute entry of date August 11, 1936, in the case of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, v. The Pacific Mutual Life Insurance Company of California, a Corporation, Cal.Sup., 96 P.2d 796, No. L. A. 17175, rendered void all proceedings and orders had and taken thereafter, including the final judgments of this court, and of the Supreme Court of the United States, referred to in the opinion on the motion to affirm the order of correction in case No. L. A. 17175, Cal.Sup., 96 P.2d 796.

In view of the fact that the order of correction in case No. L. A. 17175 has been affirmed this day, Cal.Sup., 96 P.2d 796 it necessarily follows that the motions to recall the remittiturs should be denied.

The motions are and each is denied.

35 Cal.App.2d 742

GANTNER & MATTERN CO. v. CALIFORNIA EMPLOYMENT COMMISSION et al.

Civ. 6415.

District Court of Appeal, Third District, California.

Dec. 7, 1939.

Courts ⚷209(2)

The District Court of Appeal out of respect to order of the California Employment Commission finding that employees were entitled to temporary benefits as unemployed workers, and in the exercise of its discretion, would set aside restraining order theretofore entered staying payment of the benefits, with reservation of the right upon proper showing to reimpose a restraining order if it appeared proper.

Mandamus proceeding by the Gantner & Mattern Company against the California Employment Commission of the State of California and others to test the legality of certain acts of the Commission. An alternative writ was issued and a temporary stay ordered as to the payment of benefits to certain claimants as unemployed workers.

Temporary restraining order set aside.

Milton Marks, of San Francisco, for petitioner.

Maurice P. McCaffrey, of San Francisco, and John J. Dailey, Deputy Atty. Gen., for respondents California Employment Comm. and others.

Richard Gladstein, of San Francisco, for interveners E. J. Ayer and others.

PER CURIAM.

In this matter claimants and respondents are or were employees of petitioner. Upon the 16th day of October, 1939, a picket line was established around the premises of petitioner, and claimants herein refused to cross such line and have since that date continued in their refusal to enter the premises of Gantner & Mattern Company.

These claimants, as unemployed workers, filed with the California Employment Commission claims for benefits under the California Unemployment Insurance Act. After a hearing thereon a finding was made, directing payment of such benefits to claimants, and thereafter application was made to this court by the employer for a writ of mandate to test the legality of the acts of the commission and an alternative writ was issued and a temporary stay ordered as to the payment of these claimants.

A request has been made to set aside this temporary restraining order. In view of the finding of the California Employment Commission that such employees are entitled to temporary benefits, this court, out of respect to such order and in the exercise of its discretion, believes that such restraining order should be set aside. This action, however, is not to be construed as a precedent in any similar cause before us. We reserve the right, upon proper showing in this cause, to reimpose a restraining order if it appears proper or if the cause is unnecessarily or unreasonably delayed in its presentation upon its merits.

The temporary restraining order heretofore entered is hereby set aside.

---

35 Cal.App.2d 676

STERN v. FRANKS et al.

Civ. 2422.

District Court of Appeal, Fourth District, California.

Dec. 4, 1939.

1. Bills and notes ⚷92(1)

Nothing is "consideration" for a note that is not regarded as such by both parties, and it is the price voluntarily paid for a promisor's undertaking.

[Ed. Note.—For other definitions of "Consideration," see Words & Phrases.]

2. Bankruptcy ⚷434

Where during time bankruptcy proceeding was pending creditor agreed that if debtors would execute a note for amount of creditor's claim creditor would enter into partnership with debtors and furnish capital, note executed pursuant to such agreement was unenforceable for failure of consideration where creditor refused to perform his promise, notwithstanding debtors' moral obligation, in spite of the bankruptcy proceeding, to pay their debts.

3. Bills and notes ⚷516

In action on note, evidence supported finding that note was signed upon understanding that it was to be paid out of makers' share of profits derived from business for which payee agreed to furnish capital.

4. Bills and notes ⚷44

The maker of a note is not liable where the note is payable out of a certain fund which never comes into existence.

5. Bills and notes ⚷97(1)

Where note was signed with understanding that it was to be paid out of makers' share of profits derived from business for which payee agreed to furnish capital, payee who failed to furnish capital, could not enforce note.

6. Appeal and error ⚷1071(1)

Where trial court properly determined that note was signed with understanding that it was to be paid out of makers' share of profits derived from business for which payee agreed to furnish capital, apparent error in court's findings regarding amount of capital to be furnished by payee was harmless.

◆

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Action on a note by Bernard Stern against Dan Franks and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Chaim Shapiro, of Los Angeles, for appellant.

McFadden & Coomber, of Anaheim, for respondents.

BARNARD, Presiding Justice.

This is an action on a promissory note for $2,800, dated June 9, 1934.

The defendants were in the business of wholesaling wine. About February 1, 1934, the plaintiff entered into an agreement with them whereby he would buy and pay for wine in carload lots, place the wine in a warehouse and release small quantities to the defendants from time to time as they paid for it, with a profit of five cents per gallon to the plaintiff. After three or four carloads were handled in this manner the plan was modified, the plaintiff delivering wine in carload lots to the defendants who gave him several postdated checks, dated at intervals, covering the purchase price with the plaintiff's profit. Several carloads were handled in this manner. At a time when $2,800 in postdated checks were outstanding on the last carload so handled certain creditors of the defendants levied an attachment, which led to bankruptcy proceedings. The defendants were adjudicated bankrupts, the outstanding checks were listed in that proceeding, and the plaintiff filed therein a claim for the amount of said checks. Subsequently, the note in question was given to the plaintiff by the defendants and thereafter this action was brought.

The court found that it was not true that $2,800 was now due on said promissory note; that it was true that the defendants were indebted to the plaintiff in the sum of $2,800; and that after the defendants were adjudicated bankrupts and while the bankruptcy proceeding was pending the plaintiff agreed with the defendants that if they would execute a note to him in the sum of $2,800 he would enter into a partnership with them for the purpose of wholesaling wine and would furnish $3,500 as capital, the plaintiff to hold title to all assets, the defendants to be silent partners and to work in and about the business, the plaintiff and the defendants to share equally in the profits, and that "from the profits the defendants would pay to the plaintiff the amount of the promissory note". It was further found that pursuant to this agreement the defendants executed the promissory note, and that the plaintiff failed and refused to enter into the partnership and to furnish $3,500 as capital for the business. As conclusions of law it was found that because the plaintiff had failed to fulfill his agreement the consideration for the note had wholly failed and that the promise to pay the same was unenforceable. Judgment was entered in favor of the defendants and the plaintiff has appealed.

It is first contended that it appears as a matter of law that there was not an entire failure of consideration for the reason that a moral obligation existed, in spite of the bankruptcy proceeding, to pay the preexisting debt and that this moral obligation was a sufficient consideration regardless of any breach of his agreement on the part of the appellant. The appellant relies particularly on the case of Philpot v. Gruninger, 81 U.S. 570, 577, 14 Wall. 570, 20 L.Ed. 743. In that case a note was given for a preexisting debt and on the same day the creditor agreed to put certain properties of his into a stock company being formed by the debtors and others. The question under consideration by the court was as to whether a certain instruction was prejudicial. The court pointed out that a creditor might do a favor for his debtor or enter into a new contract with him induced by which the debtor might give a note for a previously existing indebtedness. The court then said: "Without the favor or the new contract there is in such a case a full consideration for the note, and the parties may not have contemplated that the favor or the new contract was to be paid for." In the instant case, the court found that the giving of the note was to be paid for by entering into a partnership and conducting a business as such.

[1, 2] As pointed out in the case of Philpot v. Gruninger, supra, "Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking." We have here a situation where it was expected by all the parties that the pending bankruptcy proceedings would effectively end the liability of the respondents for the debt. While it is true that the moral obligation, if so intended by the parties, would have been a sufficient consideration for a voluntary agreement to pay such a debt regardless of the bankruptcy proceeding, it clearly appears that there was no such voluntary promise here and that the moral obligation was not regarded as a consideration by any of the parties. Under the circumstances here appearing, the real consideration was the agreement to furnish capital for the continuation of a business under a partnership arrangement.

The technical contention that the consideration for the note thus given was the appellant's agreement to furnish capital and enter into a business and that this promise is a sufficient consideration regardless of whether or not he broke that promise, is of no help to the appellant for another reason. The court found that the note was given under an agreement that it was to be paid out of the profits of the contemplated business, for which the appellant was to furnish the capital, although the appellant maintains that this finding is not supported by the evidence.

[3-5] While the appellant testified that he had made no agreement to go into the business with the respondents or to furnish capital for such an enterprise, both of the respondents testified to the making of such an agreement. One of them testified that while the bankruptcy proceeding was pending the appellant asked him why they could not pay something on these checks; that he told the appellant there was no way they could pay anything and that he would have to share with the other creditors; that the appellant said: "I am into it now * * * I would be willing to go further. I could possibly help you people along to help you get this money"; that they talked the matter over and it was orally agreed that the three would go into the wine business, the profits to be divided three ways; that the appellant would furnish not less than $5,000 and be the head of the business and have charge of the assets; that the other two would do the work and sell the wine; that the respondents should draw so much a week and the balance of their share should be applied on this old debt; that upon this understanding and on this agreement they signed the note; and that the plaintiff later refused to go on with the business or finance the same. The note sued upon contains the provision that any sums which the payee might receive as dividends from the bankrupt estate are to be credited thereon. The other respondent testified that he told the appellant that it would be useless for them to sign a note as it would not be worth anything because they were in bankruptcy, that they could not pay the debt unless they got into something which would yield an income, that he further told the appellant that if he would go in with them and enable them to do this they would sign the note and that the appellant agreed to the arrangement which had been discussed. We think this evidence, with the reasonable inferences therefrom, supports the finding that this note was signed upon the understanding that it was to be paid out of the respondents' share of the profits derived from the business to be conducted in the manner testified to and for which the appellant agreed to furnish the capital. The maker of a note is not liable where the note is payable out of a certain fund which fund never comes into existence. Flippen v. Abbey, 135 Cal.App. 666, 27 P.2d 792.

[6] The appellant contends that the court's finding to the effect that he was to furnish $3,500 as capital for the new business is not sustained by the evidence since the specific amount of $3,500 was nowhere mentioned in the testimony given in this connection. It appears from the evidence that the amount which the appellant agreed to put into the business was from $3,000 to $5,000. There is an apparent error in the amount mentioned in the findings, but that error is harmless as it makes no difference what the precise amount was which was to be put into the business by the appellant.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

35 Cal.App.2d 622

STALEY v. McCLURKEN.

Civ. 6263.

District Court of Appeal, Third District, California.

Nov. 27, 1939.

Rehearing Denied Dec. 27, 1939.

1. Assignments 🔑24(1)

The right to maintain an action for conversion of personal property may be based on an assignment of a chose in action executed by a third party after the alleged conversion, and it is not necessary that the assignment also transfer title to the property or the possession thereof. Civ.Code, § 954.

2. Assignments 🔑24(1, 2)

While claims for damages for personal injuries growing out of torts cannot be assigned, claims for injuries to property are assignable.

3. Assignments 🔑22

If a claim survives the death of the injured party, the claim is assignable, but if it expires with his death, it is not assignable.

4. Assignments 🔑24(1)

The general rule that to maintain an action for conversion plaintiff must show either ownership of the property or the right to immediate possession thereof at the time of conversion did not prohibit an assignee of a claim for conversion from maintaining an action for conversion. Civ.Code, § 954.

5. Assignments 🔑24(1)

Where an action for conversion is brought by the assignee of claim for conversion, the assignee need not show that he is the owner of property in question, nor that he was entitled to possession thereof at the time of conversion. Civ.Code, § 954.

6. Assignments 🔑24(1)

An action for conversion of personal property owned by plaintiff and her assignors could be maintained where evidence showed that both assignors were the owners of and entitled to the immediate possession of their respective properties at time of conversion. Civ.Code, § 954.

7. Evidence 🔑460(10)

In lessor's action for conversion of personal property stored in a building on real estate leased to defendant, parol evidence was competent to explain, but not to change, the express terms of lease with respect to identity or description of personal property intended by the respective parties to be included in the demise.

8. Landlord and tenant 🔑123

A lease reciting that plaintiff leased all her real and personal property and specifically describing real property but not enumerating any personal property except equipment used for cutting timber and in operating a shingle mill, could not be construed to include dress goods and personal effects stored in a cabin on the leased premises.

9. Evidence 🔑460(10)

In lessor's action for conversion of personal property stored in a building on real estate leased to defendant, oral evidence was competent to show that personal property in the building did not belong to plaintiff and could not have been included in the lease where plaintiff had no authority to lease such personal property on behalf of its owners.

10. Courts 🔑121(4)

Where aggregate amount of damages, including two assigned claims, for which plaintiff brought action for conversion exceeded $300, superior court had jurisdiction to determine the cause. Civ.Code, § 954.

11. Trover and conversion 🔑40(4)

In lessor's action for conversion of personal property stored in a building on real estate leased to defendant, evidence supported finding that defendant converted the property on or about a certain date.

12. Appeal and error 🔑1008(1)

In lessor's action for conversion of personal property stored in a building on real estate leased to defendant, the time of conversion was for determination of trial court.

13. Trover and conversion 🔑4

To constitute "conversion," it is not necessary that defendant shall actually appropriate and use the property for his own benefit, but it is sufficient if he merely wrongfully exercises dominion and control over it without consent and to detriment of owner of the property.

[Ed. Note.—For other definitions of "Conversion," see Words & Phrases.]

14. Trover and conversion 🔑4

Conversion lies against a person who, without consent of the owner, wrongfully exercises dominion or control over owner's

property detrimental to and in conflict with the right of possession or vested title which the owner has therein.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Vivian Staley against J. A. McClurken and another for alleged conversion of personal property. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Taft & Spurr, of Ukiah, for appellant.

H. L. Preston and Lilburn Gibson, both of Ukiah, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant, J. A. McClurken, has appealed from a judgment of $316.69 which was rendered against him in a suit for conversion of personal property. Another person was joined as defendant, but has not appealed from the judgment.

It is contended the findings and judgment are not supported by the evidence, chiefly because a large portion of the claim was based on assignments of choses in action by other persons who were the owners of portions of the property at the time of the conversion; and that the complaint fails to state a cause of action for the same reason. It is also urged the court erred in receiving oral evidence to identify the property which was leased.

The plaintiff is the owner of 142 acres of timber land in Mendocino county, containing a shingle mill, several cabins and other buildings, together with certain machinery and equipment connected therewith. Prior to September, 1936, she was living with her mother and sister in a large cabin on the premises in which she had bedding, linen and wearing apparel of the alleged value of $105.33. Her mother, Mrs. C. F. Staley, owned dishes, cooking utensils and furniture in the cottage of the alleged value of $82.93. Her sister, Gladys Gallaher, also owned bedding, cooking utensils, a banjo, phonograph, dishes, a quantity of canned fruit, and groceries in the cabin of the alleged value of $225.43. September 2, 1936, the plaintiff leased the real property, mill and equipment to the defendant, McClurken, for a term of ten years. He took possession November 11, 1936. The written lease provides in part:

"I hereby lease all my real & personal property * * * [specifically describing the real property, but failing to enumerate any personal property] consisting of 142 acres of timber land and one complete shingle mill as inspected by second parties, also all buildings and other equipment including roads and rights of ways."

About the time the lease was executed, the plaintiff, her sister and her mother temporarily left the large cabin in which they lived and stored their personal property. The door was fastened with a padlock. When the lessee took possession of the premises on November 11, 1936, without consent of the plaintiff, her mother or sister, he broke the padlock and took possession of the cabin, together with all of the personal property and effects contained therein. He used the furniture, dishes, cooking utensils, groceries and canned goods. He either threw the personal clothing and effects out, or dumped them in an old machine shed where they were damaged or lost. The plaintiff said he scattered their clothing and personal effects about the premises. After demand upon the lessee to restore the property in question and his refusal to do so, assignments of their choses in action to sue for and collect damages for converting their portion of the personal property contained in the cabin were executed by the mother and sister to plaintiff. This suit in conversion was then commenced.

The complaint was couched in three counts. The first cause of action alleged the conversion of plaintiff's own personal property. The second one charged the conversion of Mrs. C. F. Staley's personal property, and alleged an assignment of her claim therefor to the plaintiff. The third count charged the conversion of Gladys Gallaher's property and alleged an assignment of her claim to plaintiff. The prayer asked for judgment for the aggregate value of the properties of the three individuals. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff in every essential respect. A judgment was accordingly rendered against Mr. McClurken for the sum of $316.69. From that judgment this appeal was perfected.

The appellant contends that since this action is founded on tort for the wrongful conversion of personal property it was necessary for the plaintiff to prove she was the owner of the property, or at least that she was entitled to the immediate possession of it at the time of the conversion, and that this suit for damages for conversion of that portion of the property which belonged to her sister, Gladys Gallaher and her mother, Mrs. C. F. Staley, therefore, could not be maintained on their mere assignments of choses in actions which were executed after the conversion was accomplished. It is true that most of the property involved in this suit belonged to the mother and sister of plaintiff at the time of the conversion. Their portion of the personal property was never sold or transferred to the plaintiff, but their choses in action to sue for and collect damages on account of the conversion were duly assigned to the plaintiff before this suit was commenced.

[1] We are of the opinion the right to maintain an action for conversion of personal property may be based on an assignment of a chose in action subsequently executed by a third party. Sec. 954, Civ. Code; Morris v. Standard Oil Co., 200 Cal. 210, 252 P. 605; Stapp v. Madera Canal & Irrigation Co., 34 Cal.App. 41, 166 P. 823; Jackson v. Meinhardt, 99 Cal. App. 283, 290, 278 P. 462; 3 Cal.Jur. 254, sec. 15. It is not necessary that the assignment shall also transfer title to the property or the possession thereof. Stapp v. Madera Canal and Irrigation Co., supra. In the case last cited it is said in that regard, 34 Cal.App. on page 46, 166 P. on page 825 of the report:

> "The objection to the assignment secondly stated, viz., that claims for damages to real property cannot be assigned without also assigning or transferring with the claim the title to or the possession of the property damaged, is also untenable."

Section 954 of the Civil Code provides in part that:

> "A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner."

[2, 3] The rule is well established in California that while claims for damages for personal injuries growing out of torts, such as assaults, slander, malicious prosecution, or false imprisonment, may not be assigned, injuries to property may be assigned. The distinction between assignable and nonassignable causes arising in tort is determined by survivorship of the action after the death of the injured party. If the claim survives the death of the party it is assignable, but if it expires with his death it is not assignable. The California rule recognizes the fact that since the property does survive the death of the owner thereof, injury to the property growing out of a tort may be prosecuted by his representatives or by his assignee. 3 Cal.Jur. 256, sec. 15.

[4-6] In support of his contention that a cause of action for conversion growing out of a tort may not be assigned, the following authorities are relied on by the appellant: 2 Cooley on Torts, 3d ed., 848; General Motors Acceptance Corp. v. Dallas, 198 Cal. 365, 370, 245 P. 184; Hunt v. Hammel, 142 Cal. 456, 76 P. 378; Thomsen v. Culver City Motor Co., Inc., 4 Cal.App. 2d 639, 646, 41 P.2d 597; McCoy v. Northwestern Casualty & Surety Co., 3 Cal.App. 2d 534, 537, 39 P.2d 864; Winne v. Ford, 88 Cal.App. 308, 312, 263 P. 545; Covington v. Grant, 82 Cal.App. 749, 256 P. 213; The National Bank of New Zealand, Ltd., v. Finn, 81 Cal.App. 317, 340, 253 P. 757, and DuPuy v. Shay, 127 Cal.App. 476, 16 P.2d 158. In most of these cases the general rule with respect to conversion is stated that to maintain the action for damages the plaintiff must show either ownership of the property, or the right to immediate possession thereof at the time of the conversion. The preceding cases are not in conflict with what we have said regarding the right to maintain an action for conversion based on an assigned chose in action. Most of those cases involved the right to maintain a suit based on an established lien on the property. They may all be reconciled with the established rule previously stated by holding that the language employed to the effect that it is necessary for the plaintiff to show either ownership of the property or the right to immediate possession at the time of the conversion means that the owner of the property must have either title or the right of immediate possession thereof. It is neither necessary for an assignee of a chose in action, under such circumstances, to show that he is the owner of the property nor that he is entitled to the possession thereof at the time of the conversion. In the present case the evidence does show that both assignors were the owners of and entitled to the immediate possession of their respective properties. That showing meets the requirements of the law.

[7, 8] Parol evidence was competent to explain, but not to change, the express terms of the lease with respect to the identity or description of the personal property intended by the respective parties to be included in the demise. 4 Jones Commentaries on Evidence 2d ed., 2835, sec. 1552. It would be unreasonable to construe the lease to mean that plaintiff was including therein the table linen, bed linen, dress goods and personal effects described in exhibit "A" attached to the complaint. The following language of the written lease, "I hereby lease all my real and personal property" is specifically explained by that document. It is followed immediately by an explanation of what personal property was intended to be thereby demised. It refers only to "equipment" used for cutting and sawing timber and in operating the shingle mill. It reads, "consisting of 142 acres of timber land and one complete shingle mill as inspected by second parties, also all buildings and other equipment including roads", etc. Clearly, the linen and personal effects left in the large cabin were not included in the term "all my real and personal property, consisting of * * * and other equipment". In 10 California Jurisprudence 946, section 210, it is said:

> "While oral evidence is not admissible to vary the terms of a writing, yet it may be admitted for the purpose of identifying and applying the terms to the subject matter in cases of uncertainty. This applies to sales of personal property."

If it be assumed there is no uncertainty or ambiguity in the language of the lease with respect to the description of personal property demised, it follows that none was conveyed except "equipment" for use in cutting and manufacturing timber and in operating the shingle mill, and the parol evidence was therefore harmless.

[9] Certainly the oral evidence was competent to show that certain personal property which was left in the cabin did not belong to the plaintiff, and therefore could not have been included in the lease, but on the contrary that it actually belonged to the sister and the mother of the plaintiff. The plaintiff had no authority to lease their property. The court did not err in admitting oral evidence to identify the personal property covered by the lease.

[10] Since the aggregate amount of damages, including the two assigned claims, for which the plaintiff brought suit, exceeded the sum of $300, the superior court had jurisdiction to try and determine the cause. Hammell v. Superior Court, 217 Cal. 5, 17 P.2d 101; Burke v. Maguire, 154 Cal. 456; 7 Cal.Jur. 692, sec. 78. For the same reason, the complaint states a good cause of action cognizable by that court.

[11, 12] The evidence adequately shows that the appellant entered upon the timber property on November 11, 1936, and broke a padlock fastening the door of the large cabin in which the personal property was stored and converted it to his own use sometime between that date and the first of the following year. The court found that he converted the property on or about December 27, 1936. That finding is adequately supported by the evidence. There is some confusion regarding the exact date upon which the defendant exercised dominion over the property, but that conflict is immaterial. The time of conversion was a question for the determination of the trial court.

[13, 14] The defendant did not actually take and use all of the property himself. Some of it was taken from the cabin where it was stored and thrown out or placed in an old warehouse where it was damaged or destroyed. To constitute conversion it is not necessary that the defendant shall actually appropriate and use the property for his own benefit. It is sufficient if he merely wrongfully exercises dominion and control over it without the consent and to the detriment of the owner thereof. Conversion lies against one who without the consent of the owner wrongfully exercises dominion or control over his property detrimental to and in conflict with the right of possession or vested title which the owner has therein. Edwards v. Jenkins, 214 Cal. 713, 7 P.2d 702; Poggi v. Scott, 167 Cal. 372, 139 P. 815, 51 L.R.A., N.S., 925; McCaffey C. Co. v. Bank of America, 109 Cal.App. 415, 294 P. 45; Vagim v. Haslett Warehouse Co., 131 Cal. App. 197, 20 P.2d 992; Lusitanian-American Development Co. v. Seaboard D. C. Corp., 1 Cal.2d 121, 129, 34 P.2d 139; Hull v. Laugharn, 3 Cal.App.2d 310, 315, 39 P.2d 478; Watson v. Stockton Morris Plan Co., Cal.App., 93 P.2d 855. In the Poggi case, supra [167 Cal. 372, 139 P. 816, 51 L.R.A., N.S., 925], it is said in that regard:

> "The foundation for the action of conversion rests * * * upon the unwarranted interference by defendant with the do-

minion over the property of the plaintiff from which injury to the latter results."

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

35 Cal.App.2d 591

JORDT v. CALIFORNIA STATE BOARD OF EDUCATION et al.

Civ. 6290.

District Court of Appeal, Third District, California.

Nov. 24, 1939.

Hearing Denied Jan. 22, 1940.

1. Statutes 🔑181(1)

Statutes are to be construed according to intention, or at least according to apparent or evident intention or purpose, of the Legislature.

2. Statutes 🔑183

The primary rule of statutory construction, to which every other rule must yield, is that the intention of Legislature must be ascertained if possible, and when once ascertained such intention will be given effect even though it may not be consistent with strict letter of statute.

3. Statutes 🔑189

The general rule that the meaning of a statute is to be sought in the language used by Legislature does not mean that courts are always to be governed by exact phraseology and literal meaning of every word or phrase employed in a statute.

4. Statutes 🔑181(1), 184, 208, 214, 217, 218, 225

The intention of the Legislature with regard to a statute is to be ascertained, in doubtful cases, not only by considering words used, but also by taking into account other matters, such as context, the object in view, the evils to be remedied, history of times and of legislation on the same subject, public policy, and contemporaneous construction.

5. Statutes 🔑183

When the purpose of a statute is apparent, the courts will not blindly follow the letter of the statute to consequences which are inconsistent with the purpose of the statute, especially where results of a literal interpretation, if adopted, would be absurd.

6. Physicians and surgeons 🔑4

When the statute relating to qualifications of persons applying for health and development credentials before the State Board of Education was enacted, the Legislature did not intend to distinguish between graduates of medical schools and graduates of osteopathic schools, as respects the right to obtain a health and development credential. School Code, § 5.190; Code Civ.Proc. § 1859.

7. Physicians and surgeons 🔑4

Under statute relating to qualifications of persons applying for health and development credentials from State Board of Education, the Legislature, by using words "Board of Medical Examiners," intended to include any other board exercising identical powers in respect to licensing osteopathic physicians and surgeons, and hence an osteopathic physician and surgeon licensed by the Board of Osteopathic Examiners was entitled to a health and development credential, notwithstanding that he did not possess a license from State Board of Medical Examiners. School Code, § 5.190; St.1923, p. xxv; Code Civ.Proc. § 1859.

◆

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Proceeding by Edward William Jordt against the California State Board of Education and others for a writ of mandate directing the board to issue plaintiff a health and development credential. From a judgment granting the writ, defendants appeal.

Affirmed.

Earl Warren, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for appellants.

John L. Brannely, of Sacramento, for respondent.

Mr. Justice TUTTLE delivered the opinion of the court.

Respondent, an osteopathic physician and surgeon duly licensed by the Board of Osteopathic Examiners on August 27, 1930, filed his petition for a writ of mandate against appellant Board, directing said Board to issue to him a "health and development credential", under the provisions of the School Code of California, Part II. The trial court entered judgment granting the writ, and the Board now appeals from that judgment.

From the record it appears that prior to the year 1922, State Board of Medical Examiners was the sole licensing agency for practitioners from all schools of medicine and healing, including those of the osteopathic branch. In 1919, the Legislature, Statutes 1919, page 483, amended section 1775 of the Political Code, relating to the granting of certificates by county boards of education, to read in part as follows: Sub. 1(f): "Health and development certificates: To holders of certificates to practice medicine and surgery issued by the California state board of medical examiners * * *". It is conceded by all parties that no such certificate can issue until credentials are granted by appellant, State Board of Education. This provision of the Political Code is now substantially embodied in the School Code, and designated as section 5.190. Upon the passage of this amendment, *appellant proceeded to issue such credential to all osteopathic physicians and surgeons who held certificates to practice from the State Board of Medical Examiners, and who were otherwise qualified.* The Secretary of the State Board testified that if any osteopathic physician *today* presented such certificate, it would be accepted. This course continued until December 21, 1922, the effective date of an initiative act which set up a State Board of Osteopathic Examiners, granting to that Board exclusively all the powers to license osteopathic physicians and surgeons. After the date last mentioned, appellant School Board has consistently refused to grant the credential in question to any osteopathic physician or surgeon who held or holds a license from State Board of Osteopathic Examiners, upon the ground that they did not come within the provision of the School Code quoted above, they having no "certificates to practice medicine and surgery issued by the California State Board of Medical Examiners".

It is not contended by appellant that there has been any change in the requirements and qualifications of an osteopathic physician which would form the basis of the distinction made after the passage of the said initiative act. It is admitted by appellant Board that if petitioner possessed a license from the State Board of Medical Examiners they would issue the said credentials to him.

It thus appears that prior to 1923, osteopathic physicians and surgeons were eligible and qualified to receive the credential, the issuance of which is here sought by petitioner. After the adoption of the initiative measure setting up a Board of Osteopathic Examiners, California State Board of Education, appellant herein, refused to issue such a certificate to those osteopathic physicians and surgeons who did not have a certificate to practice from the State Board of Medical Examiners. In so acting, they followed the law literally. It thus appears that if no further legislation had been adopted affecting the law as it stood in 1922, and prior thereto, appellant Board would still be issuing such certificates to osteopathic physicians and surgeons who were otherwise qualified. Should the sole fact that the law was changed so that another Board (Osteopathic), issued an identical certificate to practice, deprive petitioner of the right to the certificate sought here? We believe that the answer must be found by ascertaining the legislative intent. Section 1859 of the Code of Civil Procedure provides as follows:

"In the construction of a statute the intention of the legislature and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and (a) particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."

[1, 2] In 23 California Jurisprudence, at page 725, the rule of construction of a statute is thus stated:

"It is a cardinal rule that statutes are construed according to the intention, or at least according to the apparent or evident intention or purpose of the law-makers. * * * Accordingly, the primary rule of statutory construction, to which every other rule as to interpretation of particular terms must yield, is that the intention of the legislature must be ascertained if possible, and when once ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute."

[3-5] That the courts are not bound by the literal wording of a statute is clearly stated in 23 California Jurisprudence, at page 734: "We have noticed the general rule that the meaning of a statute is to be sought in the language used by the legislature. But this does not mean that the courts are always to be governed by the exact phraseology and literal meaning of every word or phrase employed. The primary rule of intention is to be first applied. And intention may be ascertained, in doubtful cases, not only by considering the words used, but also by taking into account other matters, such as the context, the object in view, the evils to be remedied, the history of the times and and of legislation upon the same subject, public policy, contemporaneous construction, and the like. In other words, the courts will not blindly follow the letter of a law, when its purpose is apparent, to consequences which are inconsistent with that purpose; and this would seem to be particularly true when the results of a literal interpretation, if adopted, would be absurd."

[6, 7] Bearing in mind the foregoing rules of construction, what was the intent of the legislature when it enacted section 5.190 of the School Code as a statute in 1919? The law *then* was identical with the law *now*. At *that time* the Board of Medical Examiners granted certificates to practice to osteopathic physicians and surgeons, and the State Board of Education in turn granted them health and development credentials. They met the requirement of the section mentioned by being "holders of certificates to practice medicine and surgery", issued by the California Board of Medical Examiners. It was *then* the apparent and obvious legislative intent not to distinguish between graduates of medical schools and graduates of osteopathic schools. Each was accorded the same treatment when applying for credentials under the School Code. The effect of the Initiative Act of 1922 was to give the *same licensing power* to another Board—the Osteopathic. There is no question here of a change in *requirements* or *qualifications* on the part of the Board of Education or the legislature. They, in respect to this matter, have always been the same. It is a strange anomaly that an osteopathic physician who received his credentials to practice prior to the effective date of the Initiative Act of 1922, is now qualified to secure those identical credentials, while one who received such a certificate subsequent to that time is absolutely barred. The history of the legislation relating to the matter and the surrounding facts and circumstances point to the conclusion that the legislature made no distinction between different schools of healing when it enacted the law relating to qualifications of one applying for health and development credentials before the State Board of Education, and when they used the words "board of medical examiners" in section 5.190 of the School Code, they intended to include any other board exercising identical powers in respect to licensing osteopathic physicians and surgeons. That the State Board acted in good faith and without any attempt at discrimination, we have no doubt. In reaching this conclusion we have endeavored to follow the rule quoted above that "the primary rule of intention is to be first applied", and "that the courts will not blindly follow the letter of a law, when its purpose is apparent".

The contention of the state that there is a reasonable ground for discrimination between the two schools of healing upon the part of the legislature, has little bearing upon the question, as we must go back to the year of the enactment,—1919. At that time, as we have seen, no distinction whatever was made between them—no attempt at any discrimination. The Board of Education, appellant herein, had no choice whatever between the two. It held itself bound by the literal wording of the law. It could not be seriously contended that if the State Board of Medical Examiners were to be designated by some other name tomorrow, the power of the State School Board to grant such credentials would be entirely destroyed. Neither do we believe that the separation of the power to issue osteopathic licenses was intended by the legislature to have that effect, and thus deprive hundreds of otherwise qualified practitioners of the right to engage in a gainful field—a right which they previously had enjoyed without protest.

What we have said on this question has merely to do with the certification of a physician and surgeon to engage in work connected with the public schools. We do not mean to hold that the school board of any city or county, or school district cannot, in the matter of employment, exercise its discretion and choose whom it desires. The credentials sought here merely qualify a physician to accept such employment.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

---

35 Cal.App.2d 669

PEOPLE v. TIBBITTS (two cases).

Cr. 1698, 1703.

District Court of Appeal, Third District, California.

Dec. 1, 1939.

1. Burglary ⇨41(1)

Evidence that codefendant and third party entered buildings at nighttime and stole property from such buildings, that on one occasion defendant, who was codefendant's wife, by previous arrangement met codefendant and third party immediately after they had stolen a safe and aiding in concealing codefendant and third party while they were opening the safe warranted convictions for second degree burglary.

2. Criminal law ⇨511(6, 7)

Where an accomplice's testimony implicated defendants, evidence that defendants, who were husband and wife, had stolen property in their possession, and that when arrested, the husband admitted knowing it was stolen, plus evidence that defendants had left city in which burglaries were committed immediately after the crimes, was sufficient corroboration to meet requirements of statute concerning convictions on an accomplice's testimony. Pen.Code, § 1111.

3. Criminal law ⇨511(7)

It is sufficient compliance with statute requiring corroboration in order to sustain a conviction on testimony of an accomplice, if evidence of accomplice is corroborated by circumstances which tend to connect defendant with commission of offense and defendant's own statements or admissions, together with facts related by accomplice, may be sufficient proof of guilt to sustain conviction. Pen.Code, § 1111.

4. Criminal law ⇨743

In prosecution for second degree burglary, truth of defendants' testimony that they were ignorant of the burglaries and that they took certain property which a third party left in his room in defendant's house to pay for third party's rent and board was for jury.

5. Criminal law ⇨808½

Where defendants in prosecution for second degree burglary were specifically charged with entering buildings with intent of committing larceny and were not charged with commission of any other felony except larceny, and evidence showed that defendants were guilty of grand larceny and there was no evidence of commission or intent to commit any felony other than larceny, an instruction in the language of statute defining burglary was not erroneous as misleading. Pen.Code, § 459.

6. Criminal law ⇨696(2), 698(1)

In prosecution for second degree burglary where defendants were charged with entering buildings with intent of committing larceny, and there was evidence that defendants aided in cracking a safe, admission of testimony indicating that defendants had previously been suspected of other larcenies was not error, where there was no motion to strike out witnesses' statements concerning conversation with codefendant wherein codefendant was told that he was suspicioned of certain offenses, including burning safes, or request that jury be instructed to disregard reference to other safecracking incidents.

7. Criminal law ⇨370, 371(1, 12)

Evidence of other similar offenses committed at or near the same time may be competent to prove guilty knowledge, intent, or motive for commission of the crime charged by means of identical extraordinary methods or schemes.

8. Criminal law ⇨371(1, 12)

Care should be exercised in excluding evidence of other crimes on account of their apparent prejudicial nature, unless the intent, purpose, or motive of the accused person is a direct issue in the charge for which accused is being tried.

9. Criminal law ⇨371(6, 12)

Regarding the rule that intent or motive must be a direct issue to warrant evi-

dence of other offenses, the mere fact that an accused is on trial for a burglary involving the cracking of a safe probably does not justify admission of evidence of other distinct safe-cracking enterprises by accused.

10. Criminal law ⟹371(1)

Where felonious intent is an essential ingredient of crime charged, and act is claimed to have been innocently or accidentally done, or by mistake, when result is claimed to have followed the act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts, producing same result, and tending to show guilty knowledge and intent and purpose with which particular act was done and to rebut presumption that might otherwise obtain, but evidence of other acts must show them to be identical with act in question.

11. Criminal law ⟹372(1)

It is competent to show that the crime charged was part of a common scheme or plan which included numerous offenses.

12. Criminal law ⟹1186(4)

In prosecution for burglary, where defendants were charged with entering buildings with intent of committing larceny, error, if any, in admitting voluntary statement of witness for prosecution wherein witness referred to other safecracking affairs in relating a conversation with codefendant regarding the particular crimes with which codefendant was charged did not result in a miscarriage of justice, where prosecution did not elicit objectionable portion of statement and such portion could not have been anticipated. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Paul Tibbitts and Pauline Tibbitts were convicted for burglary of the second degree, and they appeal.

Judgments affirmed.

Margaret Gettys Hall, of Modesto, for appellants.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The appellants, who are husband and wife, were jointly charged and tried on three counts of an information for burglary of the second degree. Paul was convicted of all counts of the information. His wife was convicted of the second charge. Separate notices of appeal and transcripts were filed in this court by the defendants. The causes were consolidated by this court for hearing.

It is contended the judgments are not supported by the evidence, and that the court erred in the admission of evidence and in failing to instruct the jury on its own motion regarding essential elements of the crime of burglary.

The first count of the information charges the defendants with entering the store building of Montgomery Ward & Company in Modesto, with intent to commit larceny. The second count charges them with entering the garage of Alfred Matthews in the same city, with a similar intention. The third count charges them with entering the store building of J. C. Penney Company in that city, with the same intent of committing larceny.

The evidence shows that in company with John E. Diebler on the different dates alleged, the men entered each of the buildings mentioned through the skylights and stole a radio, and other merchandise, tools and machinery, an automobile and a safe containing about $2,300. Mrs. Tibbitts was an accomplice in the burglaries. The men were engaged in a roofing business at Modesto and were familiar with the means of entering the buildings through the skylights. Mr. and Mrs. Tibbitts lived in Modesto, and Diebler roomed and boarded with them. In entering the buildings the men wore gloves to avoid leaving fingerprints. By previous arrangement Mrs. Tibbitts, with defendants' automobile, met the men near the Matthews garage in the nighttime immediately after they had robbed that building. From that garage the men stole a Ford truck upon which they placed the safe and drove along a country road several miles distant to a point near Waterford, where they parked some distance from the road. Mrs. Tibbitts followed them in the defendants' car. There they burned the door from the safe by means of an acetylene torch device which they had also stolen. Mrs. Tibbitts held a canvas to conceal them from view during that process. When the safe was opened they removed the money and divided it equally between Diebler and the defendants. The stolen car and safe were left at the point where the safe was opened. The parties fled. Diebler and the defendants left Modesto and went to Vallejo. The defendants sold the radio and some other stolen property, which were afterward reclaimed. The defendants drove to Oklahoma where they were subsequently arrested and charged with the crime of burglary. A hand-bag and some other stolen property were found in their possession. Mr. Tibbitts admitted to the arresting officer that he knew the goods were "hot", meaning that he knew they were stolen. Other incriminating statements in the nature of admissions of guilt were also made by them.

John Diebler was arrested and pleaded guilty to the burglaries. He testified at the trial to all of the circumstances of each burglary as previously related, and implicated both defendants in the crimes. There appears to be no reasonable doubt of their guilt.

[1] The evidence abundantly supports the judgments of conviction of both defendants on all of the counts of the information. The defense consisted of a denial of guilt on the part of each defendant, and a claim that Diebler left the stolen property which was found in their possession in his room at their home, and that they appropriated the goods to repay them for board and rent which he owed to them.

[2-4] The only question regarding the facts of the burglaries is whether there are sufficient corroborating circumstances to fulfill the requirements of section 1111 of the Penal Code. We conclude there is an abundance of corroborating circumstances to meet the requirements of that section. It is sufficient compliance with section 1111 of the Penal Code if evidence of an accomplice to the crime is corroborated by circumstances which "tend to connect the defendant with the commission of the offense". The defendant's own statements or admissions together with the facts related by the accomplice, may be sufficient proof of guilt to sustain the conviction. People v. Adinolfi, 106 Cal.App. 261, 264, 289 P. 176; People v. McClain, 115 Cal.App. 505, 508, 1 P.2d 1085. It was solely the province of the jury to determine whether the defendants told the truth when they testified that they were ignorant of the burglaries, and that they took the property which Diebler left in his room to pay them for rent and board which he owed. People v. White, Cal.App., 94 P.2d 617. At least they had some of the stolen property in their possession. They sold the radio for $4. They left Modesto immediately after the burglaries were committed. They visited Diebler, who was confined in the general hospital at Benicia in November, after the commission of the burglaries. While they were there they went to the home of Ann McLeod, who was an acquaintance of theirs. She testified that in a conversation regarding a considerable sum of money which the defendants possessed, Mr. Tibbitts asked Mrs. McLeod if she knew where the money came from. Mrs. McLeod replied that Mr. Diebler told her "he and you worked for it". To this statement Mr. Tibbitts replied, "We did, we worked darn hard for it." Mrs. Tibbitts then said, "I helped them, I held the canvas for them while they blew the door off the safe." Later Mr. Tibbitts in the presence of his wife said to Ann McLeod regarding Mr. Diebler "If that—— —— don't keep his damned mouth shut, I'll kill him." When Mrs. McLeod asked what he had done, he replied, "He parked our baggage in the Willys 77 on a down town street. Wouldn't that have been a hell of a mess if the cops had gotten it?" This was an admission their baggage contained stolen goods. The officer who arrested the defendants in Oklahoma testified that Mr. Tibbitts told him where to find some of the stolen articles which he had disposed of. The officer then asked him, "Did you know at the time you sold them to Noble, that they were stolen articles?" to which inquiry he replied that he did.

The record contains many other incriminating circumstances leading us to conclude there is no reasonable doubt of the guilt of the defendants.

Regarding the defense that Diebler was the only party who committed the burglaries and that he falsely implicated the defendants as accomplices to the crimes, the jury was specifically warned by the express terms of defendants' instruction number 1 as follows: "It is not necessary for the defendants to prove that another person or persons may have committed the crimes alleged by the state, but if the facts and circumstances have been introduced in evidence which raise a reasonable doubt as to whether the defendant or defendants committed the crime or crimes alleged, you should acquit the defendant or defendants."

[5, 6] The defendants contend that the court erred in giving to the jury an instruction defining burglary in the exact

terms of section 459 of the Penal Code, because it informed them that if they found the defendants entered the building "with the intent to commit grand or petit larceny or any felony", they might be convicted. In support of their contention in that regard the defendants rely on the case of People v. Young, 65 Cal. 225, 3 P. 813, 814. That case is not authority for the point urged. In that case a judgment of conviction for burglary was affirmed. The court there said: "There was no error in giving the definition of burglary laid down in section 459 of the Penal Code." In the present case the defendants were specifically charged with entering the buildings with the intent of committing larceny. They were not charged with the commission of any other felony except larceny. The evidence shows that they were guilty of grand larceny. There is no evidence of the commission or the intent to commit any felony other than larceny. Grand larceny is a felony. The jury could not have been misled by the statutory definition of burglary which was given to the jury.

[7] The court did not err in the admission of evidence which may have tended to indicate that the defendants had previously been suspected of other larcenies. The challenged evidence was adduced by a statement made by the chief of police of Modesto who interviewed the defendants June 14, 1939, after their arrest, on the specific charges involved in this action. He said:

> "I told Mr. Tibbitts that I had just returned from Vallejo and that he was suspicioned of robbing three safes in Vallejo."

A motion to strike that answer from the record was denied. The witness than proceeded to say:

> "I informed him on my return from Vallejo where he was suspicioned of burning three safes in Vallejo and also of taking part in the robbery of Al Matthews garage and the Montgomery Ward store and the Penney store of this city, to which he denied any knowledge of any of the jobs at all. I told him of articles that had been taken from the garage, a safe, a car, some tools and a sander and asked him what knowledge he had of those articles. He said 'None whatever.' I asked him regarding a radio and a flexible cable, taken from the Montgomery Ward store and he denied any knowledge of that or of the articles."

There was no motion to strike out this latter statement. The court was not asked to instruct the jury to disregard the reference to other safe-cracking incidents. They were merely incidentally related as a part of the question propounded to the defendant regarding the very burglaries with which he was charged.

[8-11] **The rule is well established that in the prosecution of a criminal charge evidence of other similar offenses committed at or near the same time may be competent to prove guilty knowledge, intent or motive for the commission of the crime charged by means of identical extraordinary methods or schemes.** People v. Robinson, 107 Cal.App. 211, 224, 290 P. 470, 473; 8 Cal.Jur. 68, secs. 172–174. In the Robinson case it is said in that regard that the similarity of the unusual methods of procedure "furnish an example of his methods". But care should be exercised in excluding evidence of other crimes on account of their apparent prejudicial nature, unless the intent, purpose or motive of the accused person is a direct issue in the charge for which the defendant is being tried. It is doubtful whether the mere fact that an accused person is on trial for a burglary involving the cracking of a safe justifies the admission of evidence of other distinct safe-cracking enterprises by the defendant. In the case of People v. Schneider, 126 Cal. App. 749, 14 P.2d 1018, 1019, 15 P.2d 540, Mr. Justice Houser correctly illustrates the application of the proper rule in that regard by quoting with approval from 8 Ruling Case Law 202, as follows: "Where a felonious intent is an essential ingredient of the crime charged, and the act is claimed to have been innocently or accidently done, or by mistake, when the result is claimed to have followed the act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent and purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain. But the evidence of the other acts relied upon must show them to be identical with the act in question, otherwise they have no probative value so far as this question of mistake or accident is concerned." Again, it is competent to show that the crime charged was part of a common scheme or plan which included numerous offenses.

[12] In the present case, however, the voluntary statement of the witness merely incidentally referred to other safe-cracking affairs, in relating a conversation with the defendant regarding the particular crimes with which he was charged. The prosecution did not elicit that portion of the statement. It does not appear the objectionable statement could have been anticipated. Moreover, it does not appear there was a miscarriage of justice in the present conviction of the defendant. The error, if any, was therefore cured by the provisions of article VI, section 4½ of the California Constitution.

The judgments and the orders are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

---

35 Cal.App.2d 659

SMITH et al. v. SCHWARTZ.

Civ. 10820.

District Court of Appeal, First District.
Division 1, California.

Nov. 30, 1939.

Rehearing Denied Dec. 30, 1939.

Hearing Denied Jan. 29, 1940.

1. Automobiles 🔑245(78)

In action for death of motorist in collision on four-lane highway with approaching automobile which was making a left turn, conflicting evidence on speed of the automobiles *held* to make jury question on issue of contributory negligence.

2. Trial 🔑140(1)

Changes in testimony at subsequent trial, which allegedly resulted from use of a different map, and other changes concerning which witnesses were thoroughly cross-examined, *held* to present fact questions for jury, and not to require rejection of such testimony, especially where more than three years elapsed between the two trials, inconsistencies were not great, and opponent's witnesses also changed testimony.

3. Trial 🔑140(1)

Where witnesses are confronted with statements made by them elsewhere, it is always a fact question for the jury to decide which statement is correct or more probable, and whether witness had willfully changed testimony.

4. Automobiles 🔑245(90)

In action for death of motorist in collision on four-lane highway with approaching automobile which was making a left turn, conflicting evidence on speed of the automobiles *held* to make jury question on whether deceased motorist's contributory negligence directly or proximately contributed to the accident.

5. Evidence 🔑580

An action by a minor for personal injuries suffered in automobile accident, brought purely in her own right, was not "between the same parties" as subsequent action by such minor and her two sisters for their father's death in the same accident, so as to authorize admission at trial of the second action of testimony given at trial of the first action. Code Civ.Proc. § 377; § 1870, subd. 8.

[Ed. Note.—For other definitions of "Between Same Parties," see Words & Phrases.]

6. Appeal and error 🔑1051(3)

In action for death resulting from automobile accident, error in admitting evidence of testimony concerning speed of automobiles, given at trial of prior action for injuries suffered in the same accident, was not prejudicial where question of speed had been eliminated from the second action by defendant's concessions. Code Civ.Proc. § 1870, subd. 8; Const. art. 6, § 4½.

7. Trial 🔑129, 133(6)

Alleged misconduct of counsel *held* not ground for reversal, where opposing counsel was guilty of similar conduct and trial judge admonished the jury to disregard remarks of counsel.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Margaret Smith and others, minors, by and through Gertrude Dittnock, their guardian ad litem, against Morris J. Schwartz, for the death of Frederick Smith. From a judgment on a verdict for plaintiffs, defendant appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Kirkbride & Wilson, of San Mateo, for appellant.

Francis N. Foley, of San Mateo, for respondents.

GOODELL, Justice pro tem.

The collision which gave rise to this litigation resulted in the instant death of Frederick Smith, who was the father of the three respondents, and in severe injuries to Lorraine Smith, one of them. An action filed by Lorraine Smith against the appellant for her personal injuries was tried by the late Judge Swart without a jury and resulted in a $7,000 judgment which, on appeal, was affirmed. Smith v. Schwartz, 14 Cal.App.2d 160, 57 P.2d 1386. The present case, brought by the three daughters and heirs of the deceased Frederick Smith for damages for the death of their father, resulted in a verdict for $10,000. The appeal is from the judgment entered upon that verdict.

Between four and five o'clock on December 24, 1931, a Buick automobile driven by the appellant, traveling southerly along Bayshore highway collided with a Studebaker automobile driven by said Frederick Smith on Bayshore highway at its junction with Winchester drive at Burlingame. The Studebaker had been headed northerly and had made, or was making, a left turn to go westerly on Winchester drive when it was struck on its right side near the front by the front of appellant's Buick in the westerly southbound lane. Bayshore highway has four ten-foot traffic lanes, the two westerly lanes being for southbound, and the two easterly ones for northbound, traffic. There is a fairly wide shoulder on each side. The impact was a violent one. When the cars came to rest the Studebaker was lying on its right side pointed easterly toward the bay, southerly of the Buick, and under it were pinned its driver and his daughter Lorraine who had been riding beside him. The Buick, still on its wheels, was pointed northerly, the direction from which it had come. Winchester drive is sixty feet wide over all with an asphalt pavement for vehicular traffic thirty feet wide, but the curb lines on the edges of the pavement flare out so that where they touch the westerly edge of Bayshore highway the width of the mouth of Winchester drive is approximately one hundred feet. Rain had fallen just before the collision and the highway was wet; the day was dull and overcast but the visibility was good.

In the first case there was no issue of contributory negligence and could have been none, for even if Lorraine Smith's father had been guilty of negligence it could not have been imputed to her, and this court so held in deciding that case. In the instant case, however, the issues are different. Contributory negligence of the respondents' father was pleaded, and at the trial most of the evidence was addressed to that defense.

[1] There was the sharpest possible conflict between the plaintiffs' witnesses who saw the collision and those of the defendant who saw it. Briefly, the plaintiffs' witnesses on the one hand testified that the Studebaker had gone from the outer to the inner lane, northbound, and at a speed of from twelve to fifteen miles an hour had made the left turn northerly of the center of the intersection, while the Buick, traveling over fifty miles an hour was still a considerable distance away. On the other hand, the appellant and his wife testified that they had seen the Studebaker some two hundred fifty feet away; that it was traveling as fast as they were and coming at them "like a locomotive" and that it suddenly made the left turn into and across their path at a distance of some *fifty or sixty feet south of the intersection.* The two versions presented a sharp issue which, of course, was purely a jury question. There is no conflict in the testimony, however, as to the force of the impact. Witnesses for both sides saw the Studebaker in the air. In addition to oral evidence, the position of the cars after the collision, the glass and other debris surrounding them, and skid marks on the highway, were circumstances relied upon by the appellant in an effort to convince the jury that the collision was south of the center line of the intersection, which would mean, of course, that the Studebaker had "cut the corner".

[2, 3] The appellant's first contention is that the testimony of three of respondents' witnesses "materially changed to obviate deficiencies pointed out in a former decision, without sufficient explanation given, is discredited as a matter of law and will be disregarded". We cannot agree with this position. The witness against whose testimony the attack is chiefly directed was an eye witness, and at the first trial in 1934 marked the map then in use to illustrate her testimony as to the manner in which the Studebaker made the left turn, and was vigorously cross-examined at that trial respecting her delineations as well as respecting what she said. At the 1937 trial a different map was in use and she marked it, and was confronted with the testimony she had given in 1934 and with the old map.

There were some changes in her delineations, and under cross-examination she explained that the maps were different, and that the relative distances looked different to her. These changes do not appear to us nearly so glaring as appellant's counsel contends. Another one of respondents' witnesses testified in 1934 that when the cars came to rest there was a distance of about twenty feet between them, while at the 1937 trial he testified that they were from fifty to one hundred feet apart. When confronted with this he answered that it seemed to him *then* (in 1937) that they were about as far apart as "the length of this courtroom", but the record does not disclose what that was. The jury, of course, could see for themselves. The third witness at the first trial, whose testimony is criticized, had testified that when he first saw the Studebaker it had *commenced* to make the left turn and at the last trial he testified that it had *completed* the turn. He was thoroughly cross-examined on this as well as upon his delineations. It is interesting to note that there were changes in testimony made by appellant's witnesses as well. One of them in 1937 testified that he was traveling at about forty-five miles an hour behind appellant's car and gradually overtaking it. In 1934 it was developed by his cross-examination then, that he had admitted that appellant's car might have been traveling as fast as forty-eight or forty-nine miles an hour. Another of appellant's witnesses in 1937 testified that the Studebaker, after the accident, was fifty or sixty feet south of Winchester drive, while at the first trial he had testified that it was only twenty-five or thirty feet south of the Buick, which was an inconsistency. It must be assumed that these five witnesses on both sides, all of whom were disinterested, were equally honest. There is no more basis for the claim that respondents' witnesses changed their testimony wilfully than that the appellant's witnesses did so. At the time of the last trial almost six years had elapsed after the accident, and more than three years had elapsed after the first trial. But be that as it may, any variations or inconsistencies in their testimony between the two trials in legal effect would be no different than such variations or changes as are developed between testimony given at a pre-trial deposition, for instance, and that given later in a courtroom. It is an every day occurrence in the trial of cases that witnesses are confronted with statements made by them elsewhere, whether under oath or not, and it is always a question of fact for the jury to decide as to which statement is correct, or is more in accord with the probabilities, as well as for the jury to say whether the witness has wilfully changed the testimony, in which case, presumably, the jury rejects it. Who can say, in the instant case, but that the jury was just as critical of the changes in the testimony of appellant's witnesses as appellant's counsel now is of the changes in the testimony of respondents' witnesses. The implication from their verdict is that they were more so. After all, the weighing of all this evidence on both sides was the jury's own function. It involved the attempted impeachment of witnesses. The trial judge heard it and heard a motion for new trial and we fail to see how this case presents a question of law on appeal any more than any other case where there is impeaching testimony in the record.

[4] There is, however, an altogether different answer to this contention. It might well be that the jury, because of the matters just discussed, or for other reasons, concluded that the driver of the Studebaker had, in fact, "cut the corner" and hence had been guilty of contributory negligence, but that such negligence did not directly or proximately contribute to the accident. This argument is made by counsel for respondents (citing Ingram v. Wessendorf, 14 Cal.App.2d 16, 57 P.2d 989), and appellant's counsel concedes that "This elementary principle needs no citation of authority". The question, however viewed, was purely one of fact for the jury.

[5] The appellant contends that "The trial court committed prejudicial error in admitting into evidence the testimony of Linda Holzwarth given in the trial of a former case" on the grounds, first, that the parties in the two actions were not the same, and, second, that the foundation for the admission of her former testimony was insufficient.

Section 1870, Code of Civil Procedure, provides that "* * * evidence may be given upon a trial of the following facts: * * * 8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter; * * *." Counsel for appellant testified as to his efforts to produce this witness, who was ill, to testify in this case. Objection was made because of the inadequacy of the showing but the court ruled that the showing was sufficient. With respect to the objection that the parties were not the same, we are satisfied that the objection was good and the ruling to the contrary was erroneous.

[6] In the first action Lorraine Smith, a minor, sued by a guardian ad litem for her personal injuries sustained in this accident. She was suing purely in her own right, and, as already observed, this court, in passing upon that appeal, held that where "the infant is not an active participant in the accident, but was merely passively present, the negligence of the father in the operation of the car cannot be imputed to the infant". Smith v. Schwartz, supra, 14 Cal.App.2d at page 166, 57 P.2d at page 1388. In the present case the three daughters invoke the statutory remedy provided by section 377, Code of Civil Procedure, and sue as heirs of their deceased father. Legally they stand in his shoes, and had he been guilty of contributory negligence, such negligence would bar their recovery, as it would have barred his. The evidence in the last trial was confined almost entirely to the question of contributory negligence. It is obvious that had this case been tried first, and the Lorraine Smith case later, the evidence here could not have been read in her later case, for reasons already stated. The rule, of course, must work both ways. It is true that the California cases hold that section 1870, subdivision 8 should receive a liberal construction, but no case has been cited, and we have found none, where it has been held that the parties are the same where one action is brought for one individual's personal injuries and the other is brought by three individuals (of whom the first plaintiff happens to be one) suing upon the purely statutory right granted by section 377, Code of Civil Procedure, as heirs, for the death of their ancestor, where in the former case contributory negligence could not be, and was not, in issue, and in the latter it was. Conceding that the admission of Mrs. Holzwarth's testimony was error because of lack of identity of parties, and conceding that there was no sufficient foundation on the other ground, i. e., that her illness was not sufficiently shown—still there was no reversible error for the following reasons: Mrs. Holzwarth's testimony at the 1934 trial was addressed almost entirely to the speed of the Buick and that factor has been by appellant's concessions, eliminated from the present case. Her testimony showed that she was sitting beside her husband in his automobile, traveling southerly, following the Buick, and saw the collision at a distance of about 250 or 300 feet; that she saw the machines collide and "saw the Studebaker going up in the air, that is all I saw"; that the collision "was on the dirt and on the pavement" on her right; that she identified the Buick because as she had seen it up the road she had noticed Indian blankets piled high in the back of it; that the last time the Buick had passed her car it was "about 500 feet" (presumably northerly of the intersection). She testified that her husband drives no faster than thirty or forty miles an hour and that the Buick, when it passed them, was traveling "fifty-five or sixty miles". On direct examination she was asked whether after the collision she had made any observations as to where the cars were, or whether there was a side street, and answered that she paid no attention as she was giving all her attention to the injured child. In response to a question whether the Studebaker was opposite another street she answered in the negative, and when asked whether she knew where Winchester drive is she answered that she did not. The only questions she was asked on cross-examination were with respect to the Indian blankets in the Buick, with respect to the place where the injured child was when they were extricating her from the wreck, and lastly, the question "As you just testified, you did not notice any side street", which she answered "No". Her testimony with respect to the dirt, simply placed the wrecked Studebaker on the westerly edge of the paved highway, as other witnesses had done, but had no significance as to its location with relation to Winchester drive—as to how far south of the intersection the Studebaker might have been. She did not even notice Winchester drive, so, manifestly, could not have given testimony as other witnesses had, from which the jury could have deduced where the collision had taken place based upon the collocation of physical objects afterward. *She was not cross-examined at all with respect to the speed of the Buick,* nor with respect to what she had observed of the impact itself. Her testimony with respect to speed was purely cumulative. Mrs. Kassner had testified for the respondents that her attention had been attracted to the appellant's Buick by its speed as it passed Morrell avenue, which she judged to be fifty-five miles an hour and that she kept her eyes upon it

and it did not slacken its speed. Respondents' witness Hazeltine estimated the Buick's speed "as around between fifty, fifty-five or fifty-eight miles an hour" and that it did not decrease. Both were disinterested witnesses. The appellant's witness Bird could not testify as to the Buick's speed, but did say, "I saw two cars come together, and the car that was going north (Studebaker) seemed to raise right up in the air and turn over." He, too, was a disinterested witness. The appellant's witness Gurley, a disinterested witness, testified that he was following the appellant's Buick down the Bayshore (and, incidentally, narrowly averted crashing into the intersection wreck himself) and judged his own speed at about forty-five miles an hour and said his recollection was that he was gradually overtaking the Buick. He was then read his cross-examination at the first trial as follows:

"Mr. Foley: Q. Now, on the speed of the Schwartz car, do you recall telling me last Saturday that for anything you could say positively, the Schwartz' car might have been going as much as forty-eight or forty-nine miles an hour? A. I do.

"Q. And that was your best judgment at that time? A. Correct."

The appellant testified that as he approached Winchester drive he was traveling approximately forty or forty-two miles an hour in the fast lane. His wife testified that she knew the maximum speed limit to be forty-five miles an hour, and that she was under the impression "we were just below" that. To summarize: there were two disinterested witnesses for respondents, aside from Mrs. Holzwarth, who fixed the Buick's speed well over the maximum,—one at fifty-five, the other at fifty, fifty-five or fifty-eight miles an hour. And one of appellant's witnesses at *one time* (before the first trial) admitted the Buick's speed might have been forty-eight or forty-nine miles an hour. It must be remembered that this was on a wet pavement. Then there was the evidence of the violence of the crash, with the Studebaker lifted into the air, spun around and thrown on its side, with no conflict at all on that score. In addition to what has been said, certain concessions were made in appellant's briefs which virtually eliminate all questions of speed from the case on this appeal.

In appellant's opening brief counsel say: "The crux of this case, factually, is whether the decedent obeyed this (Vehicle Code provisions respecting left turn) law. Most of the evidence related to where decedent's car was when it turned left" and "Except for inherent incredibility of plaintiffs' witnesses below discussed, the evidence of speed is in conflict. So we must assume, for this discussion, *that defendant's speed was excessive* and that decedent's was lawful." (Emphasis ours.) And in appellant's closing brief: "In our appeal from the judgment in favor of Lorraine Smith in her former action for her personal injuries, upon the ground that the evidence showed as a matter of law that decedent's negligence was the sole proximate cause of the accident, the evidence of plaintiff's witnesses as to the speed of defendant's car was held sufficient to preclude the appellate court. (14 Cal.App.2d [160] 165 [57 P.2d 1386]). * * * *We have therefore carefully avoided raising any issue on this appeal that would come within the rule as to conflict of evidence.* On pages 11 and 12 of our opening brief, we started our discussion of the evidence of the case by *admitting that the evidence of speed was in conflict, and therefore the finding of the jury thereon is binding upon this court on the question of defendant's negligence.*" (Emphasis ours.)

In addition to what has been said there is another interesting feature in this case. The witness Walter Bird testified for the appellant at the 1934 trial and passed away before the last trial, and appellant's wife at the time of the last trial was out of the jurisdiction. Appellant offered their testimony under subdivision 8 of section 1870 Code of Civil Procedure, without objection. The testimony of these witnesses was just as vulnerable to an objection that the parties were different as was the testimony of Linda Holzwarth to which appellant objected. The appellant therefore had the advantage of having this former testimony before the jury although he had objected to similar testimony when offered by his adversary. It may well be that by thus offering this evidence, he waived any error in the admission of the Holzwarth testimony. 10 Cal.Jur., p. 825, § 111; 24 Cal.Jur. 777, § 59; Jameson v. Tully, 178 Cal. 380, 384, 173 P. 577; Estate of Visaxis, 95 Cal.App. 617, 624, 625, 273 P. 165. But independently of this possible waiver, we are satisfied for the reasons first given, and after a careful examination of all the evidence contained in this record, that the error was not prejudicial and that there should not be a reversal because of it. In our opinion the case comes clearly within the provisions of section 4½ of article VI of the Constitution.

[7] With respect to the appellant's claim that there was such misconduct on the part of respondents' counsel in the trial of this case as to require a reversal, it is sufficient to say that from a careful study of the record and the numerous exchanges between counsel which are shown therein we are not convinced by any means. There were provocations and recriminations on both sides and the trial judge was careful to admonish the jury, either on the suggestion of counsel or on his own motion, to disregard the remarks of counsel. In most of these instances no assignment of misconduct was made. In the trial of this case there were more occasions than usual where intemperate language was used and that is not to be encouraged or condoned, but each side indulged in it. Under the circumstances of this particular case it would be extremely unfair to reverse a judgment on this ground where counsel now complaining was himself subject to the same criticism which he now directs at his adversary. In any event, we are of the opinion that the admonitions of the trial court sufficiently safeguarded appellant's rights.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

DINGMAN v. A. F. MATTOCK CO.

Civ. 10944.

District Court of Appeal, First District, Division 2, California.

Nov. 30, 1939.

Hearing Granted Jan. 29, 1940.

See 104 P.2d 26.

1. Evidence ⇨5(2)

It is common knowledge that a scantling is designed for vertical weight bearing and not for horizontal weight bearing, and that an unnailed and unbraced scantling presents a hazardous means of crossing an open stairwell.

2. Negligence ⇨134(5)

In action by subcontractor against general contractor for injuries, evidence that subcontractor fell when loose scantling, which had been placed across stairwell between two levels by some unidentified person, broke, and that some of workmen had walked upon it, was insufficient to charge general contractor with negligence, irrespective of order of the Industrial Accident Commission setting forth specifications for inclined runways where erected for use of workmen.

3. Negligence ⇨65, 105

The doctrine of "assumption of risk" and the doctrine of "contributory negligence" are closely related, but they are nevertheless separate and distinct doctrines.

[Ed. Note.—For other definitions of "Assumption of Risk" and "Contributory Negligence," see Words & Phrases.]

4. Negligence ⇨136(8)

Whenever the only logical conclusion to be drawn from the uncontradicted evidence is that injured person either assumed the risk or was guilty of contributory negligence, the question becomes one of law rather than one of fact, and the injured person cannot recover.

5. Negligence ⇨65, 105

A subcontractor who sustained injuries when scantling which had been placed across open stairwell broke as subcontractor sought to ascend thereby from one level to another was barred by assumption of risk and contributory negligence from recovering from general contractor for the injuries.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Joseph Dingman against the A. F. Mattock Company for personal injuries. Judgment for plaintiff, and defendant appeals.

Reversed.

Bronson, Bronson & McKinnon, of San Francisco, for appellant.

Wayne R. Millington and Norman S. Menifee, both of Redwood City, for respondent.

SPENCE, Justice.

Plaintiff, a subcontractor, sued defendant, the general contractor, seeking damages for personal injuries sustained when plaintiff fell to the bottom of an open stairwell in a dwelling house which was under construction. Upon a jury trial, plaintiff had judgment, from which judgment defendant appeals.

The construction of the dwelling house had progressed to the point where the framework and roof had been completed. The plumbers and electricians were on the job and the lathers were due to commence their work very shortly. The stairs had not as yet been built into the stairwells.

Plaintiff sustained his injuries while endeavoring to make the ascent from the kitchen level to the maid's room level on a piece of "two by four" scantling placed across the open stairwell, one end of which scantling rested upon the kitchen floor and the other end of which rested upon the maid's room floor. The scantling broke and plaintiff fell to the basement.

It appears from the evidence that the maid's room level was not a full story above but only four feet, nine inches, above the kitchen level. The maid's room was over the garage, the level of which garage was perhaps a similar distance below the kitchen level. Directly under the kitchen was the basement, the level of which basement was perhaps three or four feet below the garage level.

The maid's room was accessible from the back of the house. Some of the workmen had also used certain cleats nailed upon the studdings in the kitchen as well as a portable ladder for the purpose of gaining access to the maid's room from the kitchen through the spaces between the studdings. There was a conflict in the evidence as to whether the above-mentioned cleats had been removed prior to the accident and there was also a conflict as to whether there was any portable ladder in the kitchen at the time of the accident. There was a further conflict as to whether the scantling involved in the accident had been previously used by others for the purpose of making the ascent through the open stairwell.

On the day of the accident, plaintiff, who had the subcontract for the electrical work, desired to consult defendant's foreman in connection with some electrical work which was to be done in the garage. Defendant's foreman was in the maid's room and plaintiff was in the kitchen. Plaintiff started to go to the maid's room by ascending the loose scantling laid across the open stairwell. According to his testimony there was loose lumber and other building materials on the floors of the house and elsewhere and this particular scantling, which was resting at an angle of about forty or forty-five degrees across the stairwell, was not nailed in any way. He nevertheless assumed to make the ascent by this means, carrying some materials in one hand and holding on to the studdings at the side of the stairwell with the other. The scantling on which he was walking broke and his injuries resulted.

On this appeal numerous points are urged by appellant but the main contention is that the evidence was insufficient to sustain the verdict. In our opinion, this contention must be sustained and it therefore becomes unnecessary to discuss the points relating to alleged prejudicial error in the charge to the jury.

The rules governing the liability of those in possession of premises to those entering the premises by invitation have been frequently stated and the authorities are cited and discussed in 20 Ruling Case Law, page 55 et seq., sections 51 and 52. The true ground for imposing liability is there set forth and thereafter it is said on page 57, "And, hence, there is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant." The foregoing text is quoted with approval in Mautino v. Sutter Hospital Association, 211 Cal. 556, at pages 560 and 561, 296 P. 76 and similar statements are found in other cases arising in this jurisdiction. In Shanley v. American Olive Company, 185 Cal. 552, at page 555, 197 P. 793, at page 794, the court said, "A person * * * invited upon the premises of another may recover from such owner 'for any injuries received owing to the dangerous condition of the premises known' to the owner and not known to the person so invited * * *. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give the invitee notice or warning of an obvious danger." Again in Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801, at page 802, the court said, "He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care." The foregoing rules, which were applied in the above-mentioned cases to situations involving completed structures and premises, have also been applied to situations involving buildings under construction or repair. Ambrose v. Allen, 113 Cal.App. 107, 298 P. 169; Slyter v. Clinton Constr. Co., 107 Cal.App. 348, 290 P. 643; Cole v. L. D. Willcutt & Sons Co., 218 Mass. 71, 105 N. E. 461; Doremus v. Auerbach, 176 App. Div. 512, 163 N.Y.S. 239; Gainey v. Peabody, 213 Mass. 229, 100 N.E. 336; White v. E. & F. Const. Co., 110 Conn. 692, 147 A. 17; Decatur v. Chas. H. Tompkins Co., 58 App.D.C. 102, 25 F.2d 526. It is apparent that the reason for the application of the rule is even greater in the last-cited cases as buildings under construction or repair ordinarily present many obvious dangers to those who may be in or about such buildings.

[1, 2] In the instant case, the danger of ascending from one level to another on a small, loose scantling resting across an open stairwell should have been obvious to anyone and particularly to respondent, who had been an electrical contractor for more than twenty years. It is a matter of common knowledge that a scantling is designed for vertical weight bearing and not for horizontal weight bearing and that an unnailed and unbraced scantling presents a hazardous means of crossing an open stairwell. The danger was not one which was concealed and was not one of which appellant had superior knowledge. On the contrary, respondent testified on cross-examination that he "had no difficulty in seeing"; that he could see that stairwell was open and that the stairs had not been installed; and that "the condition of the studding, and the two by four lying there, and everything was all open and visible". Under the rules set forth in the foregoing authorities, it appears that the evidence was insufficient to show negligence on the part of appellant as there was nothing to show a violation of any duty owing by appellant to respondent. In this connection, however, respondent calls attention to an order of the industrial accident commission, introduced in evidence, relating to "runways". There is nothing in this order which required "runways" at all stages of construction and the order merely sets forth certain specifications for "inclined runways, where erected for the use of workmen". There is no showing here that any "runway" was "erected" for any purpose. All that appears is that a loose scantling had been placed across the stairwell between the two levels by some unidentified person and that some of the workmen had walked upon it. In our opinion, this showing was insufficient to show a violation by appellant of the above-mentioned order.

[3-5] But in any event, we do not believe that respondent may recover even if it be conceded that there was some evidence of negligence on the part of appellant. It is contended by appellant that the uncontradicted evidence showed as a matter of law that respondent assumed the risk and that he was guilty of contributory negligence. We are of the opinion that this contention must be sustained. The doctrine of assumption of risk and the doctrine of contributory negligence are closely related and they are frequently discussed together. They are nevertheless separate and distinct doctrines (Miner v. Connecticut River R. Co., 153 Mass. 398, 26 N.E. 994), and there appears to be a particularly appropriate field for the application of the doctrine of assumption of risk in those cases where one enters upon the premises of another and encounters obvious dangers resulting from construction activities. See Restatement, Torts, secs. 340 and 341. These doctrines have been applied, either separately or together, under various circumstances. Mautino v. Sutter Hospital Assoc., 211 Cal. 556, 296 P. 76; Quinn v. Recreation Park Association, 3 Cal.2d 725, 46 P.2d 144; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801; Ambrose v. Allen, 113 Cal.App. 107, 298 P. 169; Slyter v. Clinton Constr. Co., 107 Cal.App. 348, 290 P. 643; Gleason v. Fire Protection Engineering Co., 127 Cal.App. 754, 16 P.2d 750; Campion v. Chicago Landscape Co., 295 Ill.App. 225, 14 N.E.2d 879. As appears from some of the authorities cited, whenever the only logical conclusion to be drawn from the uncontradicted evidence is that the injured person either assumed the risk or was guilty of contributory negligence, the question becomes one of law rather than one of fact and the injured person cannot prevail. Considering the uncontradicted evidence in the present

case, we see no escape from the conclusion that respondent did assume the risk and that he was guilty of contributory negligence as a matter of law.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

35 Cal.App.2d 705

ATKINSON v. ATKINSON.

Civ. 2423.

District Court of Appeal, Fourth District, California.

Dec. 5, 1939.

1. Divorce 🔑263

Where a judgment awarding support and maintenance to wife in a divorce action is payable in monthly instalments, execution cannot issue on such judgment until after default in payment of an instalment, and the statute of limitations does not commence to run until default.

2. Divorce 🔑263

Where affidavit supporting petition for issuance of execution on a judgment entered in 1925 awarding a wife support and maintenance in divorce action showed that judgment was payable in monthly instalments and that instalments were promptly paid until August 1, 1932, the affidavit sufficiently set forth reasons for nonenforcement of judgment by execution within the 5-year period provided by statute and satisfied requirements of statute concerning execution on a judgment after 5 years. Code Civ.Proc. §§ 681, 685.

3. Execution 🔑73

Generally, a motion for issuance of execution after lapse of 5 years after its entry is addressed to sound discretion of trial judge, but such discretion is not a capricious discretion, but is guided in its exercise by fixed legal principles. Code Civ.Proc. §§ 681, 685.

4. Execution 🔑73

Where plaintiff could not have had execution on a judgment awarding support and maintenance payable in instalments to wife in divorce action within the 5-year period because instalments were promptly paid and statute of limitations had not run against unpaid portion of judgment, or at least the greater part thereof, and plaintiff, due to circumstances, had to apply to trial judge in order to have execution issued, the trial judge did not have discretionary power to refuse plaintiff's motion for execution on judgment. Code Civ.Proc. §§ 681, 685.

5. Execution 🔑73

Where execution could not have been issued within 5-year period and statute of limitations has not barred plaintiff's judgment, or a considerable portion thereof, issuance of an execution is to be regarded more as a matter of right than of judicial discretion, except in unusual circumstances. Code Civ.Proc. §§ 681, 685.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Proceeding by Pearl E. Atkinson against Charles E. Atkinson, wherein plaintiff filed a petition for the issuance of execution on a judgment awarding plaintiff a monthly allowance as support and maintenance in a divorce action against defendant. From an order denying a motion to issue execution on the judgment, plaintiff appeals.

Order reversed.

F. D. R. Moote, of Los Angeles, and Best & Best, of Riverside, for appellant.

Kelley & Hews, of Riverside, for respondent.

MARKS, Justice.

This is an appeal from an order denying a motion to issue an execution on a judgment.

On September 14, 1925, in an action for divorce plaintiff was awarded $150 a month for her support and maintenance. Payments in full were made regularly by defendant until November 1, 1932. He thereafter paid $100 per month from that date to August 1, 1937, upon the promise "that as soon as business conditions improved he would make up his back payments". No payments were made for the months of August, September and October, 1937. When the petition to issue the execution was filed on February 24, 1938, it was claimed and not denied that there was $3,300, besides accrued interest, unpaid on the judgment.

Defendant admitted that since the divorce he had accumulated property of a value, above incumbrances, in excess of $30,000. He admitted placing title to the major part of this property in the name of his brother and that it was later transferred to his second wife. He claims this last transfer was for a valuable consideration. He had other property of small value standing in his own name.

Defendant testified that his wife was ill and that he was not in good health; that he was a practicing physician engaged in the general practice of medicine in Banning, California; that his income from his practice had been greatly reduced. We find no statement of his net earnings nor of his net income, if any.

Defendant urges that the affidavit of plaintiff supporting the petition for the issuance of the execution was defective in that it did not sufficiently set forth the reasons for failure to proceed in compliance with the provisions of section 681 of the Code of Civil Procedure and that such failure to set forth such reasons was sufficient ground for denial of the motion. Sec. 685, Code Civ.Proc.

[1, 2] Under the facts of this case we regard the affidavit as sufficient in this respect. Section 685 of the Code of Civil Procedure has to do with the enforcement of judgments after the lapse of five years from the date of their entry. The section requires reasons to be set forth why the judgment was not enforced within the five years. In the instant case the five years after the entry of judgment expired in 1930. The judgment was payable in monthly instalments. All instalments were paid promptly as they fell due up to August 1, 1932, almost seven years after the entry of judgment. Execution cannot issue on such a judgment until after default in the payment of an instalment and the statute of limitations does not commence to run until such default. De Uprey v. De Uprey, 23 Cal. 352; Gaston v. Gaston, 114 Cal. 542, 46 P. 609, 55 Am.St.Rep. 86; Harlan v. Harlan, 154 Cal. 341, 98 P. 32; Yager v. Yager, 7 Cal.2d 213, 60 P.2d 422; Shields v. Superior Court, 138 Cal. App. 151, 31 P.2d 1045. Thus it clearly appears from the affidavit that the judgment was not enforced by writ of execution within five years from the date of its entry because performance of its terms by defendant rendered further enforcement impossible. This is a clear and convincing reason for nonenforcement of the judgment by execution within the five-year period. It certainly should have satisfied the requirements of section 685 of the Code of Civil Procedure and should have left no question to be determined that involved any discretion on the part of a judge.

Defendant relies on the case of Williams v. Goodin, 17 Cal.App.2d 62, 61 P.2d 507, where it appeared that the defendant was in poor health and an order refusing to issue the execution after the five-year period was affirmed. There was a vigorous dissenting opinion filed by Mr. Presiding Justice Houser, now Associate Justice of the Supreme Court. In two later cases the dissenting opinion was approved and followed. See, McClelland v. Shaw, 23 Cal. App.2d 107, 72 P.2d 225; Passow v. Bell, 27 Cal.App.2d 360, 81 P.2d 224. We therefore conclude that the views expressed in the dissenting opinion expresses the majority view in California.

[3] That a motion for the issuance of execution after the lapse of five years after its entry is addressed to the sound discretion of the trial judge cannot be doubted. See cases cited in McClelland v. Shaw, supra, 23 Cal.App.2d pages 109, 110, 72 P.2d 225, 227.

In McClelland v. Shaw, supra, it was said: "'"It is true, as claimed by the learned counsel for the respondents, that orders like the present, in legal parlance, rest very much in the discretion of the court below, and will not be disturbed by this court unless we are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion. (Citing authorities.) The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit in foro legis, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other." Bailey v. Taaffe, 29 Cal. 422, 423, 424.

"'It is the intent of the law, and it would seem the intent, as well, of good morals, that everyone being able should pay his debts. Here we find the debt ripened into a judgment. Several years go by and it is not paid. The law does not contemplate that, the time of the statute of limitations having run, the liability to pay has completely passed. The motion made in this case is provided for by law. There must, then, be something added to the mere fact of the expiration of the time and that the judgment debtors were possessed of personal property, which would move the court to deny the right given by the statute. Section 685 of the Code of Civil Procedure. As was said in Hovey v. Bradbury, 112 Cal. 620, at page 625 (44 P. 1077, 1078): "Nor, when we come to view plaintiff's conduct generally, can there be seen any act or omission upon his part which would justify so stern a treatment of his claim as its rejection under the doctrine of laches. That doctrine, as has been said, is neither technical nor arbitrary. It is not designed to punish a plaintiff. It can be invoked only where to allow the claim would be, because of the claimant's own acts, to permit an unwarranted injustice. It looks to the peace of society, and not to the punishment of the claimant, even if he has been negligent."'"

[4] We can find no valid reason in the record which would permit the exercise of a sound discretion in denying the motion in question here. Plaintiff could not have had execution within the five-year period for reasons already given. Because of the peculiar circumstances of this case she had to apply to the trial judge in order to have the execution issued at all. Shields v. Superior Court, supra. Her demand, or at least the major part of it, had not been barred by the statute of limitations. Defendant had not been prejudiced by her forbearance and had probably benefitted from it. He has some property that is subject to execution and which should be applied to the payment of his debt.

[5] As it is the intent of the law as well as of good morals that a defendant should pay his debt that has ripened into a judgment (Demens v. Huene, 89 Cal.App. 748, 265 P. 389); as defendant has not been injured by any delay; as the statute of limitations has not run against the unpaid portion of the judgment, or at least the greater part thereof, we can find no rule of law nor sound reason supporting the order in question here. Where, as here, execution could not have been issued within the five-year period, and where the statute of limitations has not barred a plaintiff's judgment, or a considerable portion thereof, we regard the issuance of an execution more as a matter of right than of judicial discretion except in the face of unusual circumstances which do not appear here.

The order is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

35 Cal.App.2d 691

THEW v. THEW.

Civ. 2458.

District Court of Appeal, Fourth District, California.

Dec. 4, 1939.

Hearing Denied Feb. 1, 1940.

1. Divorce 🔑249(2)

The word "profit," used in property settlement agreement which was entered into between husband and wife during pendency of divorce action, and which provided that wife should receive 10 per cent. of profit derived from mineral deposits extracted from certain land, indicated the excess of returns over expenditures and cost of production.

[Ed. Note.—For other definitions of "Profit," see Words & Phrases.]

2. Contracts 🔑170(1)

Generally, where uncertainty arises concerning provisions of an agreement, the court will make inquiry regarding how parties themselves understood the language, and, when they have acted upon that understanding, finding that agreement should be construed as acted upon will not be disturbed by reviewing tribunal. Civ.Code, §§ 1598, 1655, 1656.

3. Divorce ⇨249(2)

The meaning of provision of property settlement agreement which was entered into between husband and wife during pendency of divorce action, and which provided that wife should receive 10 per cent. net profit derived from sale of certain property, was determinable by expressed intention of parties in the agreement, where no actual sale took place so that there was no conduct of parties to guide the court. Civ.Code, §§ 1655, 1656.

4. Divorce ⇨249(2)

Under property settlement agreement which was entered between husband and wife during pendency of divorce action, and which provided that wife should receive 10 per cent. of net profit derived from sale of mineral property or, in event of extraction of mineral deposits, 10 per cent. of profit derived from such deposits, the wife was entitled to 10 per cent. of the net value of the land, and hence she was entitled to 10 per cent. of the profit derived from the mineral deposits extracted from the land, and 10 per cent. of net profit derived from first sale of the land made after the agreement was executed. Civ.Code, §§ 1641, 1643.

5. Divorce ⇨249(2)

Under property settlement agreement which was entered into between husband and wife during pendency of divorce action, and which provided that wife should receive 10 per cent. of "net profit" derived from sale of certain community property which was awarded to husband, the wife upon a sale of the property would be entitled to sale price of the property, less the customary and usual expenses of the sale, where there was no evidence that husband expended money or performed labor on land after execution of agreement for which the husband was entitled to compensation. Civ.Code, §§ 1654, 1656.

[Ed. Note.—For other definitions of "Net Profits," see Words & Phrases.]

6. Husband and wife ⇨279(1)

In agreement between husband and wife, the "net profit" from a sale of realty is determined by excluding from the sale price, the original cost of the property, and the customary and usual costs of the sale, including escrow fee, policy of title, execution and recording of deeds, payment of taxes, and judgment liens, if any, and realtor's commission for making the sale.

7. Covenants ⇨84

Where second wife took title to land with knowledge of covenant contained in property settlement agreement entered into between husband and first wife, providing that first wife should receive 10 per cent. of net profit derived from sale of certain land or, in event of extraction of mineral deposits, 10 per cent. of profit derived from such deposits, and quitclaim deed from first wife to husband which contained similar provision was recorded prior to recording of deed conveying the land to husband and second wife as joint tenants, second wife was bound to carry out covenant according to original intention of husband and first wife, regardless of whether the covenant was a covenant running with the land.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Margaret L. Thew against Cora A. Thew to enforce provisions of a property settlement agreement. From an adverse judgment, the defendant appeals.

Affirmed.

Fred A. Wilson, of San Bernardino, for appellant.

John A. Hadaller, of San Bernardino, for respondent.

GRIFFIN, Justice.

This is an action to enforce the provisions of a property settlement agreement upon the theory that the covenant therein contained constitutes a covenant running with the land. The parties filed a stipulation setting forth the facts. The plaintiff (herein referred to as "first wife") had instituted an action for divorce from one Hollie H. Thew. While the action was pending, the plaintiff and Hollie H. Thew (herein referred to as "husband") entered into a property settlement agreement dated February 21, 1933. Included in the property divided by the agreement was a section of desert land which is the land involved in this action. The title to this land stood in the name of the husband, although it constituted community property. This section of land, as well as other real and personal property, was conveyed under the agreement by the first wife to the husband, the conveyance being thus expressed: "(1) The party of the second part, (the wife) for and in consideration of the covenants and agreements hereinafter contained, does by these presents absolutely and forever relinquish, release, surrender, transfer, grant and convey to the party of the first part all the right, title and interest she may now have as a joint tenant, tenant in common, or otherwise, and any and all right, title and interest she may now have or hereafter acquire as the wife of the party of the first part in and to all that certain real and personal property described as follows, * * all of section 1, township 8, north range 4 East, S.B.B.M. consisting of 640 acres and 38/100 acres, subject to certain reservations and exceptions now of record, reserving the right to extract Jasper from 20 acres of said land * * * said real and personal property hereinbefore described to be and become, by virtue of this instrument, the sole and separate property of the party of the first part * * * said party of the first part * * * accepts the said real and personal property as his sole, and separate property."

Other real and personal property was conveyed by the husband to the first wife, with similar recitals. The agreement contains mutual waivers of interest. In addition to setting forth these mutual conveyances and waivers, the document contains a covenant by the first wife and several covenants by the husband. One of the covenants of the husband is thus expressed: "(4) The party of the first part does further contract and agree that he will pay to the party of the second part ten (10%) per cent of the *net profit* derived from *the sale* * * * (of the property here in question) *or* in the event of the extraction of any mineral deposits herefrom, ten (10%) per cent of the profit derived from such mineral deposits." (Italics ours.) After the agreement was executed, an interlocutory decree of divorce was granted, followed by the final decree of divorce on September 4, 1934. Immediately thereafter, to wit, on September 5, 1934, the husband and the appellant (herein referred to as "second wife") were married. It was stipulated that within six months after her marriage, the second wife was informed of the property settlement agreement and the covenant in question and had actual knowledge thereof.

The court found that appellant and her husband, from the money received from the sale of minerals extracted from the property in question under contract with the Chamberlain Company, since January 4, 1937, paid respondent one-tenth of the sums which they received until the death of Hollie H. Thew on May 14, 1937.

In the verified complaint there appears as exhibit A a quitclaim deed of the property in question dated *March 18, 1935,* executed by Margaret L. Thew to Hollie H. Thew, and recorded *January 18, 1937,* at *10:10 a. m.,* which contains the following provision: "In consideration of this conveyance, the said Hollie H. Thew hereby agrees to pay to the said Margaret L. Thew ten per cent (10%) of the net profit he may receive from the sale of said real property, or in the event of the extraction of any mineral deposits therefrom, then ten per cent (10%) of the net profit he may receive from such mineral deposits." The due execution of this deed is admitted by the verified answer of Cora A. Thew.

On January 16, 1937, conveyances were executed which resulted in placing the land in question, as well as other property, in the names of the husband and second wife as joint tenants. These instruments were recorded *January 18, 1937 at 10:11 and 10:12 a. m.* respectively.

Subsequent to the death of the husband, the second wife received $985.74 from the sale of bentonite extracted from the land in question. The second wife is still the owner of the land, except as her right, title or interest is or may be affected by the covenant to which we have referred. The stipulation of the parties attempted to dispose of all admissions contained in the pleadings in conflict with the facts set forth in the stipulation.

By the judgment the court decreed: "That Margaret L. Thew, the plaintiff, do have and recover of and from the defendant Cora A. Thew, the sum of $98.57, which is ten per cent net of $985.74 admitted by defendant to have been received * * * for Bentonite extracted * * * from the land * * * pursuant to an agreement since May 14, 1937" and that "* * * in addition * * * is entitled to 10 per cent of the net of any and all additional money received or to be received by defendant for Bentonite and/or other mineral substance extracted and sold from the land * * * and is likewise entitled to 10% net of the amount which shall be received from the sale of the said land as a whole * * * whenever the same may be sold" and "that the covenant in the property settlement agreement * * * whereby Margaret L. Thew quitclaimed and granted her rights * * * to Hollie H. Thew

* * * and whereby Hollie H. Thew agreed to give said wife 10% net of sale price of the said land or in the event of extraction of any mineral deposits therefrom, that he would pay her 10% net of the profits derived from the sale of such mineral deposits, same being the consideration going to Margaret L. Thew from Hollie H. Thew for the conveyance of the rights of said wife * * *, constituted and does constitute a covenant running with the said real property so conveyed; and that the said plaintiff is now vested with an estate, interest, lien and incumbrance on, to or with respect to said real property by reason of said covenant" and "that Cora A. Thew is the owner of and entitled to possession of the said real property, subject to the interest, estate, lien, covenant and incumbrance thereon in favor of plaintiff. * * *"

From this judgment the defendant has taken this appeal.

Appellant argues that the covenant is void for uncertainty; that it reads in the disjunctive "or" and that therefore the parties to the agreement did not contemplate that the first wife should participate in both the sale price and the profit from the mineral extracted; that the agreement does not set forth the means by which the "profit" as that term is used, can be ascertained, citing Civil Code, section 1598, and Prince v. Lamb, 128 Cal. 120, 126, 60 P. 689.

[1] Respecting the provision relating to the profit from the extraction of mineral deposits, it appears to us that the term "profit" in its ordinary interpretation as here applied, clearly indicates and embraces the excess of returns over expenditures and cost of production. The record indicates that the second wife and her husband made payments to the first wife from the profits above mentioned under the property settlement agreement for a period of several months. Apparently there was no confusion, during that period, as to its interpretation, or the intention of the parties.

[2] It is a general principle that whenever uncertainty arises concerning the provisions of an agreement the court will always inquire as to how the parties themselves understood the language and when they have acted upon that understanding, the finding of the court that it should be construed as acted upon will not be disturbed by an appellate tribunal. Sutliff v. Seidenberg, Stiefel & Co., 132 Cal. 63, 64 P. 131, 469; secs. 1649, 1655 and 1656, Civ.Code.

[3,4] The remaining portion of the covenant relating to the 10 per cent of the net profit to be derived from "the sale" of the land is deserving of more serious consideration. Since no sale actually took place, we do not have the conduct of the parties to guide us but must resort to inferences and other facts proven and found for its construction. The expressed intention of the parties in the property settlement agreement should determine this point. It seems to have been in the minds of both parties to the agreement that a sale of the property was either contemplated at that particular time, or was thought of as a possible happening in the near future, in which event the first wife was to receive her ten per cent of the net profit immediately and which would thus conclude their property division. This seems the more probable because the definite article "the" is used in connection with "sale", instead of the indefinite article "a". Hollie H. Thew may have thought that if any deal for a sale should not be consummated and he should decide to mine the property himself, and reduce its value by mining, respondent should not be deprived of her interest. He provided for that contingency and, therefore, agreed to compensate her for such diminution of the value of the property by mining as would come about in the ordinary process of mining that kind of mineral, namely, bentonite. By mining the property over a period of years, and extracting the mineral that made it valuable as a mine, a sale of the property after such extraction would bring considerably less than if the sale took place shortly after the property settlement agreement. To obtain her total one-tenth of the value of the property, as it existed at the date of the property settlement agreement, she had to receive it from both transactions.

That construction, we think, is rational and logical and should be adopted. Sections 1641 and 1643 of the Civil Code provide: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" and "a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties".

[5] It could not be reasonably contended that the intention of the contracting parties to the property settlement agreement meant a net profit on "every" sale that might or would take place after "the sale" or one sale, or the first sale made after the agreement was signed. As to the mode or method of arriving at what is commonly understood to be the net profit from "the sale" section 1656 of the Civil Code helps to determine that. "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded." What is usage in the division of a net profit from a sale of land? Were this a matter of a sale among partners some of whom had expended more labor and time in the development of property than the others, usage might decree that those who had spent more money, time and labor on the development should receive more of the net profit, but here there is no evidence of inequality in time and labor or money. For all the record shows, Hollie H. Thew did not personally mine the land and whatever labor might have been hired to develop it originally, as we can readily assume from the stipulation of fact that it was community property, was paid out of community funds. The mining of the land by the Chamberlain Company from which the revenue was derived did not impose any special labor or expenditure on Hollie H. Thew or the appellant. Hence, appellant's argument that the parties may have not only contemplated the actual cash outlay of the husband in the acquisition and maintenance of the property but also the unliquidated demands as recompense for services of the husband in supervising and maintaining the property is not only not based upon any facts in evidence supporting the view, but is answered by the stipulation that the property was community property, and was not personally mined by the owner.

[6] We observe that there is no specific law defining what are "net profits from sales". Since the language of the covenant relates "ten (10%) per cent of the net profit derived from the sale" the implied parts can relate only to net profit from the sale. The customary and usual costs of the sales are an escrow fee, a policy of title, execution and recording of deeds, payment of taxes, judgment liens, if any, realtor's commission for making the sale, etc. Excluding the original cost to the community estate, what is left is a "net profit". This particular property was community property at the time of making the agreement. Subsequent to the execution and delivery of that instrument, it became the sole and separate property of the husband, Hollie Thew, but subject to the reservation and covenant. On the basis of the community interest prior to the property settlement agreement, we cannot see that Hollie Thew would have been in any position to make an extra claim for the purchase price of the land, because that came out of the community earnings and all other expenditures made on the land prior to that property settlement agreement would be in the same category.

As to any extra claim for management or expenditure of work and time after the separation, there is no evidence that he expended any extra time on it or mined the land himself. The only rational charges he could have had in mind would have been the ones which came about in the sale of the land as we have enumerated above. To hold otherwise would result in a forced construction predicated on facts not in evidence and the drawing of inferences from facts not proven. If, as we have seen, Hollie Thew intended to give his wife the one-tenth of the net value of the land as of the day and date of the property settlement agreement, either by an immediate sale thereafter, which would have concluded his pact with his first wife, or, lacking a sale, then by ten per cent of the money received by him as royalties, we must also assume that, whether he himself remained alive to effect the payment of that one-tenth value either by a sale or by mining the land, the original intention to pay the one-tenth of the value of the land could not expire with his death if the debt was not fully paid, but would have to pass on to those who took the title impressed with that obligation. If he did not in truth and fact intend that she should have the one-tenth of the value of the land, he most likely would not have made the provision that it was to come out of the land itself. Doubtless he would have made some other provision for the payment of the one-tenth of the value of the land, either in instalment payments that had nothing whatever to do with the land, or provision for payment of a lump sum based on an agreed valuation of the land as of the date of the property settlement agreement. This he did not do. It is a fair construction that the one-tenth was to come out of the land and only the land.

Section 1654 of the Civil Code states the rule of construction which is most applicable to the facts related. "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; * * *."

Appellant argues that there was no intention that the first wife should retain any interest in the property. In the instant case Cora A. Thew, the appellant, took title to the land with full and actual knowledge of the covenant concerning the percentage respondent was to receive out of the land, and this knowledge she had long prior to the time she acquired title and long prior to the making of the agreement for the mining of the property with the Chamberlain Company. The quitclaim deed from the first wife to Hollie H. Thew was recorded prior to the recordation of appellant's joint tenancy deed. She had full knowledge of similar reservations and covenants therein.

[7] We will not endeavor to discuss, analyze, or distinguish the difference between personal covenants and covenants which run with the land. In so far as the facts of this case are concerned, a complete answer is stated in Richardson v. Callahan, 213 Cal. 683, 3 P.2d 927, 929, where the court said: "The marked tendency of our decisions seems to be to disregard the question of whether the covenant does or does not run with the land and to place the conclusion upon the broad ground that the assignee took with knowledge of the covenant and it was of such a nature that, when the intention of the parties, coupled with the result of a failure to enforce it, was considered, equity could not in conscience withhold relief." See, also, Pomeroy's Equity Jurisprudence, 2d Ed., §§ 688 and 689; Whitney v. Union Ry. Co., 11 Gray, Mass., 359, 71 Am.Dec. 715; 7 R.C.L., p. 1102, § 18; Washburn on Real Property, vol. 2, § 1205; Sacramento Suburban Fruit Lands Co. v. Whaley, 50 Cal.App. 125, 194 P. 1054.

We conclude, therefore, that having taken title with knowledge of the covenant and having acted upon it without evidencing any uncertainty as to its provisions, and knowing the intention of the parties who made the covenant, appellant is bound both in law as well as in equity, to carry out the covenant according to the original intention of the makers thereof.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

---

35 Cal.App.2d 680

HOWES v. REEVES et al.

Civ. 2459.

District Court of Appeal, Fourth District, California.

Dec. 4, 1939.

1. Woods and forests 🔑8

In action to quiet title to cabins, with furniture therein, located on national forest land under permits from the forest service, evidence sustained finding that at time of death plaintiff's husband was not owner of any interest in the cabins and improvements therein so that plaintiff was not entitled to relief as against successors in interest of son and sister-in-law in whose favor husband had procured issuance of permits, notwithstanding that husband continued to use all the cabins, and that he paid the taxes and rent during his lifetime.

2. Woods and forests 🔑8

Presumption, if any were to be indulged with respect to the ownership of cabins, with furniture therein, located on national forest land under permits from the forest service, was in favor of an intended gift to those in whose favor issuance of permits was procured, rather than in favor of an intended fraud on the forest service in unlawfully holding permits in the name of others.

3. Woods and forests ⚿8

In action to quiet title to cabins, with furniture therein, located on national forest land under permits from the forest service, evidence indicating that cabins had been given to predecessors in interest of defendants was, under the circumstances, presumptively applicable to furniture as well as cabins, and the evidence, with reasonable inferences therefrom, was sufficient to support finding of ownership in defendants as against any rights of plaintiff.

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Nada Howes against Owen J. Reeves, Edgar T. Howes and others to quiet title to certain cabins and the furniture therein. Judgment for defendants, and plaintiff appeals.

Affirmed.

Drumm, Tucker & Drumm and Fred D. Johnston, all of Santa Ana, for appellant.

Hahn & Hahn and Allyn H. Barber, all of Pasadena, for respondents.

BARNARD, Presiding Justice.

The plaintiff brought this action to quiet her title in and to certain cabins located on two cabin sites in a national forest, including the furniture in the cabins. The named defendants filed separate answers denying the plaintiff's ownership of the property in question and asserting ownership in themselves, respectively. The court found in favor of the defendants and entered judgment that defendant Reeves is the permittee-lessee of one of the lots in question and the owner and entitled to the possession of the cabins, improvements, and furniture thereon, and that the defendant Howes is the permittee-lessee of the other lot and the owner and entitled to the possession of the cabins, improvements and furniture situated thereon. From this judgment the plaintiff has appealed.

The question presented is whether the evidence supports the findings that the appellant is not the owner of the articles in question and that the respective respondents are the owners thereof. The question of ownership depends upon whether these articles were or were not owned by one Edgar H. Howes at the time of his death in 1935. The appellant is his widow and it is not disputed that she has succeeded to such rights in the property as he possessed at the time of his death. The respondent, Edgar T. Howes, is a son of Edgar H. Howes and, for convenience, we will refer to the latter as Mr. Howes.

The cabin sites, on which the property here in question is situated, are known as lots 231 and 233 of a certain tract in the San Bernardino mountains, a part of a national forest. Prior to 1916, Mr. Howes leased from the forest service a cabin site in this tract known as lot 232, under a written permit calling for an annual rental of $15. On this lot he erected what is referred to as the "large cabin", with other improvements. In 1916, he leased under a similar permit lot 233 in this tract, on which he erected two smaller cabins. For some years he maintained the cabins on both lots as a mountain home for the joint use of all of his family, including his son, one of the respondents here. In 1926, he married the appellant, who is his second wife. A month or two later, his son Edgar T. Howes also married and went east on his honeymoon. A month later the forest service wrote to Mr. Howes advising him that under its rules allowing only one site to a permittee and his family he could not hold both lots 232 and 233, that it would be necessary to cancel the permit for one of the lots, asking him to advise them "which one you will give up" and telling him there was nothing to prevent a relative "outside of your immediate family taking the other lot". He replied asking them to have the lease for lot 233 "put in name of" Edgar T. Howes. A new permit or lease for lot 233 was issued in the name of Edgar T. Howes and it remained in his name until 1937 when, at his request, a permit was issued to his brother-in-law, the respondent Reeves. In 1927 a third cabin was built on lot 233 by Mr. Howes. All three cabins on that lot were one-room cabins, used for sleeping purposes.

In 1930 one Skiles, who held a lease to lot 231 in this tract, relinquished his lease. Mr. Howes paid him $1,200 for his cabin, which was located on that lot. A new lease for the lot was issued to a sister-in-law of Mr. Howes and a bill of sale to the cabin was issued to the sister-in-law but delivered to Mr. Howes. The sister-in-law paid nothing for this transfer. The permit for this lot stood in the name of the sister-in-law until 1932 or 1933 when it was transferred to a sister of Mr. Howes. After the death of Mr. Howes, in 1935, this sister caused the permit or lease to lot 231 to be transferred to the name of the respondent Edgar T. Howes. Up to the death of Mr. Howes the cabins on all three lots continued to be used by various members of the Howes family and their guests.

The permit or lease for these lots provided that any buildings placed thereon might be removed by the lessee within a reasonable time after the expiration or revocation of the lease. One of the officials of the forest service testified that under their rules such buildings were to be removed within sixty or ninety days. Relying on this removal privilege the appellant argues that these cabins and improvements constituted personal property which did not pass to a new lessee of the land, that there is not sufficient evidence to show that Mr. Howes made a gift of this personal property to his son in the one case and to his sister-in-law in the other case, and that these new lessees were in fact holding the new leases and the cabins on the lots in trust for Mr. Howes. According to appellant's theory Mr. Howes put these lots in the name of others with a secret understanding that they were to be held for him and he continued to be the real lessee or permittee, and continued to be the owner of the personal property which remained thereon. In other words, this theory is based upon the fact that he was violating the rules of the forest service and working a fraud on the government, and she now asks a court of equity to declare that some sort of an equitable trust existed in order that this fraud may be perpetuated and its ends carried out.

[1] While the appellant relies on the forest service rules, and the terms of the leases and permits, to show that the cabins were personal property, they entirely ignore the provision that any such improvements must be removed within a reasonable time after expiration of the lease. Aside from the fraud which alone can support the appellant's theory the buildings on lot 233 were not removed within a reasonable time after Mr. Howes gave that lot up and had not been removed at the time of his death nearly ten years later. It would have been equally illegal for Mr. Howes to have acquired a lease to lot 231 in 1930, since he still retained lot 232 and continued to retain it until his death. If he at one time had a right to remove the buildings therefrom that right was not exercised within a reasonable time after the lease was terminated by the lessee who had put the buildings on that lot. Without going further into the matter it must be held, under familiar equitable rules, that at the time of his death Mr. Howes was not the owner of any interest in the cabins and improvements here in controversy and the court correctly so found.

[2, 3] Moreover, we think there is sufficient evidence to support the findings that the respondents are the owners of the cabins in dispute. They are the present holders of the leases or permits, which provide for their right to remove the improvements. The respondents rely on such facts as that Mr. Howes continued to use all of the cabins, that he paid the taxes on the cabins and for the rental of the land during his lifetime, and that he paid for the construction of another cabin on lot 233. On the other hand, there is evidence that Mr. Howes made no attempt to dispose of the property in question by will. He gave all of his property to his then wife, his will stating that he made no provision for his son, one of the respondents here, for the reason that he had made other provision for him during his lifetime. Shortly before his death he told an intimate friend that he had divided up his property and had given the little cabins to his son and the "big cabin" to his wife. The son testified that from 1926 on he considered that the improvements on lot 233 belonged to him and there is evidence that Mr. Howes' sister-in-law had, at one time during the lifetime of Mr. Howes, claimed the right to convey lot 231 to others. Mr. Howes intentionally left improvements on these lots which he knew he could not hold for himself, and caused the lots to be leased to his relatives. The inference may reasonably be drawn that he intended to comply with the rules of the forest service and intended to give these improvements to these relatives, believing that they could and would continue to be available, as they had been, for the common benefit of the entire family. They were so used in connection with his own

lot and there was no occasion for any member of the family to assert his rights or make any demands for exclusive possession. There is no evidence that Mr. Howes made any claim of ownership to any of the property in question after 1936. If a presumption is to be indulged in it should be in favor of an intended gift rather than an intended fraud. There is some evidence indicating a gift which, under the circumstances, may be presumed to apply also to the furniture in the cabins and we think this evidence, with the reasonable inferences therefrom, is sufficient to support the finding of ownership in respondents as against any rights of the appellant.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

14 Cal.2d 617

PEOPLE v. STRALLA et al.

Cr. 4227.

Supreme Court of California.

Nov. 20, 1939.

As Modified Dec. 19, 1939.

1. Criminal law 🔑304(1)

For purpose of determining whether body of water on which alleged offense was committed was a "bay" within constitutional provision fixing boundary of state, Supreme Court could examine historical data and maps, public papers and records, and take judicial notice of such geographical, historical, and political data even though the same had not been introduced in evidence in the trial court. Code Civ.Proc. § 1875; Pol. Code, § 33; Const. art. 21, § 1.

A "bay" is an indentation in the shoreline of a body of water; the water between two projecting headlands; sometimes, an arm of the sea connecting with the ocean; an inlet of the sea usually smaller than a gulf, but of same general character; the name is used, often for large tracts of water, around which the land forms a curve, or for any recess or inlet between the capes or headlands; an indentation of the sea into the land with a wide opening; a wide opening or indentation in a coast line.

[Ed. Note.—For other definitions of "Bay," see Words & Phrases.]

2. States 🔑12(3)

Adjacent waters to the distance of three miles or a marine league are territorial waters, subject, however, to the right of innocent passage by foreign ships.

3. States 🔑12(3)

The jurisdiction of the state of California over the sea is that of an independent nation with the right to decide and prescribe its own boundaries.

4. Constitutional law 🔑68(1)

The extent of territorial jurisdiction is primarily a question for the lawmaking power.

5. States 🔑12(3)

In the absence of any controlling legislative or executive act or judicial decision, the court may consider "international law," namely, the customs and usages of civilized nations in determining what constitutes a bay which may be included within the territorial waters of a state.

[Ed. Note.—For other definitions of "International Law," see Words & Phrases.]

6. States 🔑12(3)

A state has policing jurisdiction over its territorial waters.

7. Criminal law 🔑97(2)

The waters, known as Santa Monica Bay, which lie in an indentation of the coast of California between points about 25 nautical miles apart, the line of the coast forming a curve inward to a distance of about 10 miles from a line drawn between the headlands, constituted a "bay" included within the territorial boundaries of the state of California by the Constitution, and jurisdiction of the state over the waters of the bay could be exercised for all purposes, including the prosecution of defendant who operated a gambling ship anchored in the waters of the bay. Pen.Code, § 337a, subd. 2; Pol.Code, § 33; Const.1879, art. 21, § 1.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Frank H. Smith, Judge.

Anthony Stralla and Harold Adams were indicted for keeping and operating a gambling ship, and from a judgment of conviction, Harold Adams appeals.

Affirmed.

For prior opinion, see 88 P.2d 736.

Joseph L. Fainer, of Los Angeles, Chauncey Tramutolo, of San Francisco, and Samuel L. Rummel, Jerry Giesler, and Louis P. Pink, all of Los Angeles (George M. Naus, of San Francisco, of counsel) for appellant.

Ben L. Blue, of Los Angeles, amicus curiæ.

Earl Warren, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Jere J. Sullivan, and Thomas F. O'Brien, Deputy Dist. Attys., all of Los Angeles, for respondent.

Frank E. Hinckley, of San Francisco, and Ben Harrison, U. S. Atty., and Irl D. Brett, Asst. U. S. Atty., both of Los Angeles, amici curiæ.

SHENK, Justice.

The grand jury of the county of Los Angeles returned an indictment against the defendant Adams and others, charging the violation of subdivision 2, section 337a, of the Penal Code. The specific accusation was the keeping and operating of the gambling ship "Rex" anchored in the waters of what is known as Santa Monica bay, at a point four miles oceanward from the end of the municipal pier of the city of Santa Monica and approximately six miles landward from a line drawn between the headlands, Point Vicente on the south and Point Dume on the north. The defendant Adams appealed from the judgment of conviction and from the order denying his motion for a new trial.

There is no dispute as to the sufficiency of the evidence to support the jury's verdict if the offense was committed within the jurisdiction of the state. The appeal presents the single question whether the territorial jurisdiction of the state of California extends over the area of the waters known as Santa Monica bay. If it does, an affirmance of the judgment will be required.

The territorial boundaries of the state were defined in the Constitution of California of 1849, article XII, section 1, which fixed the ocean boundary of the state as: "thence running west * * * to the Pacific Ocean, and extending therein three English miles; thence running in a Northwesterly direction, and following the direction of the Pacific Coast, to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also all the islands, harbors, and bays along and adjacent to the Pacific coast." That language was readopted in the Constitution of 1879, section 1, article XXI, without substantial change. Section 33 of the Political Code enacted in 1872 provides that the sovereignty and jurisdiction of this state extends to all places within its boundaries as established by the Constitution, subject to qualification in cases where jurisdiction has been ceded to or acquired by the United States Government.

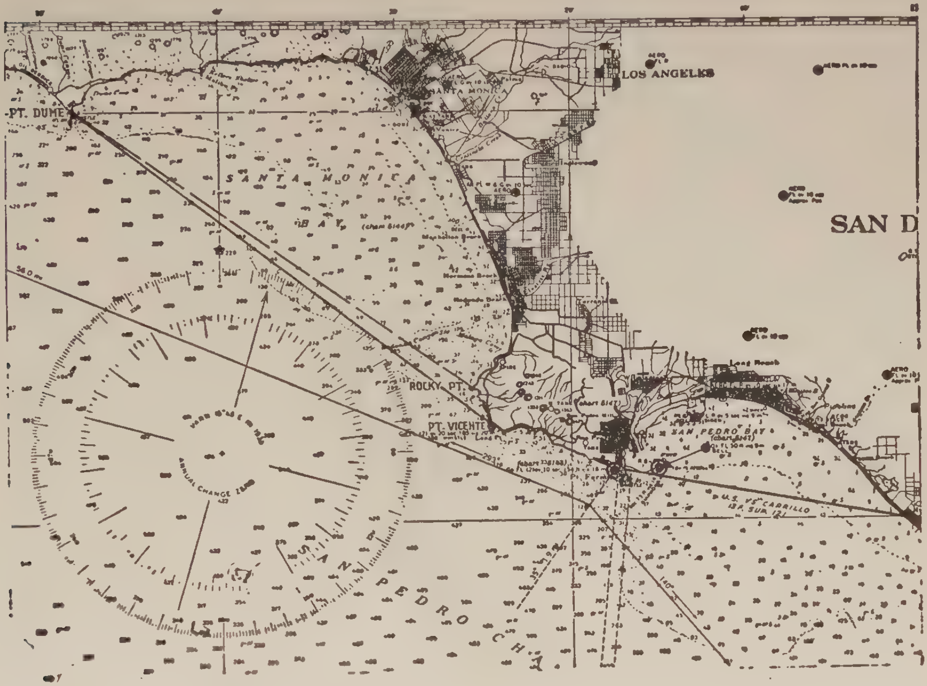
The immediate problem for solution is whether the waters commonly known as Santa Monica bay were intended to be included within the designated territorial boundary. The answer comprehends not one, but several factors, namely: Is this body of water a bay geographically? Is it a bay historically? Is it a bay legally?

[1] For the purpose of considering those factors this court may examine historical data and maps, public papers and records, and may take judicial notice of such geographical, historical and political data even though the same have not been introduced in evidence in the trial court. Code Civ.Proc. § 1875; Rogers v. Cady, 104 Cal. 288, 38 P. 81, 43 Am.St.Rep. 100; Varcoe v. Lee, 180 Cal. 338, 343, 181 P. 223.

The waters known as Santa Monica bay lie in an indentation of the California coast between Point Vicente and Point Dume. The points are distant from each other about 25 nautical miles or about 29 geographic miles. The line of the coast forms a curve inward to a distance of about ten miles from a line drawn between the headlands. The line of the shore recedes slightly from Rocky Point, which is to the north of Point Vicente, making the distance between shores landward from Point Dume and Rocky Point greater than the distance between those two points. Otherwise the bay is widest between Point Vicente and Point Dume.

The foregoing geographic description appears to conform to the definition of a bay. Funk & Wagnalls New Standard Dictionary defines "bay" as "an indentation in the shoreline of a body of water; the water between two projecting headlands; sometimes, an arm of the sea connecting with the ocean". We find in Webster's International Dictionary: "An inlet of the sea, usually smaller than a gulf, but of the same general character. The name is used, often for large tracts of water, around which the land forms a curve, or for any recess or inlet between capes or headlands; as, the Bay of Biscay; Hudson Bay." The Oxford English Dictionary (1933) gives: "An indentation of the sea into the land with a wide opening." The Encyclopedia Brittanica, eleventh edition: "A wide opening or indentation in a coast line. This may be of the same origin as 'bay', in the architectural sense, or from a Latin word which is seen in the place named Baiae." "A bay is a bending or curving of the shore of the sea or of a lake, and is derived from an Anglo Saxon word signifying to bow or bend. For a similar reason the word bay is in Latin termed sinus, which expresses a curvature or recess in the coast." State v.

Town of Gilmanton, 14 N.H. 467, 477. A visual illustration of the outline of the land surrounding the waters known as Santa Monica bay, and of the land and waters constituting San Pedro bay, is reproduced herein from a portion of a map designated as "United States—West Coast California, San Diego to Santa Rosa Island" (geodetic survey charts numbers 5144 and 5147), with lines drawn between headlands added. The waters known as San Pedro bay extending from Point Firmin to the city of Huntington Beach, formerly called Point Lasuen, have been judicially declared to be a "bay". United States v. Carrillo, D.C., 13 F.Supp. 121. This map serves to give an easy and affirmative answer to the question whether the waters known as Santa Monica bay are geographically a bay. Visually, if one of these bodies of water is a bay geographically, the other would seem also to be a bay.



Historically it appears that both Cabrillo (in 1542) and Viscaino (1603) noted this body of water as "Gran Ensenada" or "Grand Bay." Bancroft's Works, vol. 18, History of California, vol. 1, 1542–1800, p. 71; Paulen's Atlas of Historical Geography of the United States, plate No. 17. Both Spain and Mexico claimed and exercised exclusive jurisdiction over the waters of this coast as far as the mouth of the Columbia river, for a distance of ten leagues into the ocean, and such claim was confirmed by treaty with Great Britain in 1790. See Ocean Industries, Inc. v. Superior Court, 200 Cal. 235, 242, 252 P. 722.

Historians refer to the waters as Santa Monica bay. (Ingersoll's Century History of Santa Monica Bay Cities, p. 121; Charles Sumner Warren, History of Southern California; California Blue Book, 1932, p. 520.) They indicate that the bay received its present name probably earlier than 1827, and that the city of Santa Monica was named later. Rand-McNally & Co.'s Atlas of the World (United States, 1908, p. 277), contains the following statement: "The sea-coast of California extends the entire length of the State and is indented by many bays and harbors, that of San Francisco being the finest on the Western coast, nearly fifty miles long and about nine miles wide. Other bays or harbors of importance are San Diego, San Pedro, Santa Monica, Santa Barbara, San Luis Obispo, Monterey, Tomales, Bodega, and Humboldt."

Before 1872 "Shoo Fly Landing" on Santa Monica Bay afforded shipping facilities for the La Brea rancho. Ingersoll, Century History of Santa Monica Bay

Cities, p. 141. The same writer states (pp. 144–145) that in 1875, in conjunction with the construction of a railroad, a new wharf, 1700 feet in length, reaching a depth of 30 feet at low tide, was completed and the first ship landed at this wharf in June of that year. Collis P. Huntington, about 1892–1893, was instrumental in building the "Long Wharf", 4600 feet, at a cost of about $1,000,000. (Newmark, Sixty Years in Southern California, 1853–1913.) Guinn's Historical and Biographical Record of Southern California (printed 1902, p. 139 et seq.), states facts showing the importance of Santa Monica as a shipping point.

The long struggle to obtain funds to establish a breakwater in either of Santa Monica or San Pedro bays as a port for Los Angeles, which ended in the selection and establishment of the port in San Pedro bay, has become part of historical Californiana. Article "The Battle for Southern Pacific Ports", by Lanier Bartlett, in "Westways", August, 1935, pp. 26-29.

The defendant quotes the following from the United States Coast Pilot, issued by the United States Department of Commerce under the supervision of the Coast and Geodetic Survey, page 57: "From Point Vicente to Point Dume, about 25 miles, the coast forms a broad open bight about ten miles wide known as Santa Monica Bay". He thus argues that an open bight is not a bay within the accepted terminology of what constitutes a bay. But we are also referred to the statement in the same survey that "Monterey Bay * * * is a broad, open bight, twenty miles long, between Point Pinos and Point Santa Cruz, and nine miles wide * * *." Monterey bay was determined to be territorial waters in the case of Ocean Industries, Inc. v. Superior Court, 200 Cal. 235, 252 P. 722.

The defendant contends that a body of water which may answer the definition of a bay, does not constitute a bay unless it also affords protection and safe anchorage to vessels engaged in shipping, and that Santa Monica bay does not offer the advantages of a harbor. The evidence and the historical facts do not support the statement. The defendant refers to the discussion before the 54th Congress, 1896, as indicating a lack of secure refuge in Santa Monica bay. But the evidence there produced does not necessarily negative the characteristics of Santa Monica as a bay or a harbor. The controversy centered on the problem of which bay, Santa Monica or San Pedro, was the better site for the project of establishing a port for Los Angeles.

In a history of the Los Angeles Harbor district, compiled by Ella A. Ludwig and published by the Historical Record Company, Inc., (California), referring to the report of the board of engineers appointed to investigate the question of which bay was the more eligible location for such harbor, it is stated: "There was a lengthy and full comparison of the two places, Santa Monica and San Pedro. On the comparative advantages for arrival and departure, the board held that there was no essential difference between the sites of San Pedro and Santa Monica. The question of distance from Los Angeles was declared to be unimportant * * *. On the question of construction, after going into all details, it was declared in substance that the cost of San Pedro would be much less than at either of the locations suggested at Santa Monica". The fact that San Pedro bay was finally selected does not refute the evidence of use of Santa Monica bay as a harbor. Nor is the fact that Santa Monica bay affords less protection from Northwesterly winds a controlling consideration. San Pedro bay, situate on the southerly curve of the peninsula or projection of land formed by Point Vicente and Point Firmin, is open to southeasterly gales, as to which Santa Monica bay, along the northerly curve of that peninsula, affords protection. Leading into the latter curve in Santa Monica bay, a deep canyon, known as Redondo canyon, provides passage for ships almost to the breakwater line along Redondo beach. Also, oceanward and to the northwest of Santa Monica bay lie the islands of Santa Cruz and Santa Rosa; and to the southwest, Catalina and San Clemente islands. The position of the islands undoubtedly affords some protection against gales coming from their direction. In his Century History of Santa Monica Bay Cities, Chap. 1, p. 121, Ingersoll notes that "the waters of this bay are ordinarily quiet since the force of the waves is broken by the seaward islands and the deep, recessed position of the shoreline". Moreover, the "Rex", which has no motive power of its own, has been anchored at the same point in Santa Monica bay for the past five or six years. If the question whether Santa Monica bay is a harbor were important in the solution of the problem presented, the foregoing fact would tend strongly to refute the contentions of the defendant that Santa Monica bay, as a harbor, is not within the territorial waters of the state.

In discussing the legal sources on the question of what constitutes a bay, the defendant places reliance upon the case of United States v. Morel, 26 Fed.Cas. 1310, 1311, No. 15,807, wherein a distinction was made between high seas, and roads, harbors and ports. After noting the distinctions made by Lord Hale in the fourth chapter De Jure Maris, the court said: "We see here a clear and reasonable distinction taken between the main sea or ocean, and such parts of its waters as may flow into places so situate and secured by the circumjacent land as to afford a harbor or protection for vessels from the winds, which make the sea dangerous. The open sea, the high sea, the ocean, is that which is the common highway of nations, the common domain, within the body of no country, and under the particular right or jurisdiction of no sovereign, but open, free, and common to all alike, as a common and equal right." And, quoting from Lord Hale, the court continued "The expression [high seas] describes the open ocean where the dominion of the winds and waves prevails without check or control. Ports and harbors, on the contrary, are places of refuge in which protection and shelter are sought, within the enclosures and projections of land." It is obvious that the extent of the harborage offered by the places so described will vary; but mere variations which become apparent in making comparisons with other harbors may not preclude judicial recognition of Santa Monica bay as a harbor, in view of its geographic conformation and the history of its uses as such.

[2] Furthermore it does not appear that the law of nations defines, circumscribes or restricts the character of a body of water which may be included within the territorial boundaries of a country in accordance with the defendant's contentions. Many writers and courts have dealt with the question of what arms of the sea washing its coast may constitute the territorial waters of a sovereign state. It is now uniformly agreed that adjacent waters to the distance of three miles or a marine league are territorial waters subject, however, to the right of innocent passage by foreign ships. Moore, International Law Digest, vol. 1, pp. 698 et seq; The Marianna Flora, 11 Wheat. 1, 24 U.S. 1, 6 L.Ed. 405; The Ann, 1 Fed.Cas. p. 926, No. 397; In re Marincovich, 48 Cal.App. 474, 477, 192 P. 156. The prevailing claims of territorial jurisdiction over bordering waters and enclosed arms of the sea represent a diminution of the exclusive sovereignty over large bodies of water, such as the Adriatic, the Gulf of Genoa, the North sea, and the Baltic sea, which in earlier days were closed seas. "Thenceforward the progress of maritime jurisdiction was reversed—from mare clausum to mare liberum. And the Sovereignty allowed by International law over portions of the sea is in fact a decayed and contracted remnant of the authority once allowed to particular states over a great part of the known sea and ocean. * * * The English claims dwindled to claims over territorial water close to the coast, and over portions of the sea interposed between promontory and promontory known as the King's Chambers, and over the whole of the narrow seas for ceremonial purposes." Maine, International Law, 77, 79; see also Maxey, International Law, p. 228 et seq. The latter authority says: "That the jurisdiction of a state over its marginal waters rests upon international rather than municipal law seems to admit of little doubt;" but he at the same time admits that there is no room for doubt that there exists the right to exercise such jurisdiction, and that the only dispute is as to the extent of it.

What are territorial waters for the purpose of excluding foreigners from exercising unregulated fishing privileges therein has generally been the subject of convention between nations. See Moore, supra, p. 716 et seq.; Note 46 L.R.A., page 270. In 1884 (150 MS.Dom.Let. 6; Moore, supra, p. 718) Mr. John Davis, assistant secretary of state, in a reply concerning the subject of whale fishing off Bahia bay on the Brazilian coast, expressed the following: "The general law and rule is understood by this Government to be that beyond the marine league or three-mile limit, all persons may freely catch whale or fish. In computing this limit, however, 'bays' are not taken as a part of the high seas; the three miles must be outside of a line drawn from headland to headland."

It is of important significance that our state legislature has designated nearly the entire area of Santa Monica bay as state territory for the purpose of regulating fishing privileges in those waters (Fish and Game Code, Stats.1929, p. 1181, Stats.1933, p. 394, sec. 88), and has thus asserted the jurisdiction of the state for that purpose in and over the waters wherein the "Rex" is anchored.

One of the rights which it is stated justifies the doctrine of the territoriality of adjacent waters, is the right to exercise "surveillance of ships which enter those waters, whether passing through or stopping there * * * in order to guarantee the efficient police and the development of the political, commercial, and fiscal interests of the bordering state". (Moore, Digest of International Law, supra, pp. 698–699.) Such right exercisable in adjacent waters would necessarily also be appropriate in territorial bays, harbors and inlets. The same authority indicates that the headland doctrine has received some limitation when the question has become the subject-matter of convention between nations. The three-mile limit applicable to adjacent waters was in some instances taken as restricting other coastal territorial waters to those inlets having an entrance six miles or two marine leagues in width. See Commonwealth v. Manchester, 1890, 152 Mass. 230, 25 N.E. 113, 9 L.R.A. 236, 23 Am.St.Rep. 820; Manchester v. Commonwealth of Massachusetts, 139 U.S. 240, 11 S.Ct. 559, 35 L.Ed. 159; Mahler v. Norwich & New York Transportation Co., 35 N.Y. 352, 355. A ten-mile headland doctrine has been asserted. Moore, supra, p. 720. In 1896, when the extension of the territoriality of adjacent waters from one to two marine leagues was a subject of diplomatic conversation, Mr. Richard Olney, secretary of state, observed that "an extension of the headland doctrine, by making territorial all bays situated within promontories twelve miles apart instead of six, would affect bodies of water now deemed to be high seas and whose use is the subject of existing conventional stipulation". Moore, supra, p. 735.

Prior to that time, however, the United States had asserted jurisdiction over the waters of Delaware bay. Opinion of the Attorney-General, Edmund Randolph, 1793, Seizure in Neutral Waters, 1 Op.Atty.Gen. 32, Am. State Pap. For. Rel. L, 148; See note (a) Emory v. Collings, 1 Harr., Del., 325–327. The opinion of the attorney-general was concerned with the question whether the brig "Grange" was seized within territorial waters of the United States. The attorney-general quoted from and discussed the opinions of early text writers as authority for his conclusion that such waters were territorial, and then made this statement: "These remarks may be enforced by asking, What nation can be injured in its rights, by the Delaware being appropriated to the United States? And to what degree may not the United States be injured, on the contrary ground? It communicates with no foreign dominion; no foreign nation has, ever before, exacted a community of right in it, as if it were a main sea; under the former and present governments, the exclusive jurisdiction has been asserted. * * *"

Bristol channel was held to be British territorial waters. Reg. v. Cunningham, 1859, Bell's C. C. 72, 86. Conception bay on the coast of Newfoundland, having an average width of fifteen miles with the distance between the headlands more than twenty miles, has also been declared to be British territorial waters. Direct United States Cable Co. v. Anglo-American Telegraph Co., [1877] L.R. 2 App.Cas. 394. In the course of the opinion in that case it was said:

"Passing from the Common Law of England to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbours, estuaries, and bays land-locked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'bay' for this purpose.

"It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon shot from shore to shore, or three miles; some a cannon shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in Reg. v. Cunningham, Bell's Cr. C. 72, was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his Commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable.

"It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule the difficulty of the task would not deter their Lordships from attempting to fulfil it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

On the other hand, we may note that by treaty between the United States and Great Britain, it was settled that the former government has no exclusive jurisdiction in the waters of Behring sea outside of the three-mile limit. 27 Am.L.Rev. 703; La Ninfa, 9 Cir., 75 F. 513.

Chesapeake bay, with an entrance of twelve miles between the headlands, was declared to be territorial waters. (Second Court of Commissioners of Alabama Claims, Stetson v. United States, No. 3993, Class 1.[1]) It was there said: "Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory. . . .; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig Grange and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the 'high seas' within the meaning of the term as used in section 5 of the act of June 5, 1872."

[3] In Manchester v. Massachusetts, 139 U.S. 240, at page 264, 11 S.Ct. 559, at page 564, 35 L.Ed. 159, the Supreme Court of the United States said: "The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the state. * * * The statutes of the United States define and punish but few offenses on the high seas, and, unless other offenses when committed in the sea near the coast can be punished by the states, there is a large immunity from punishment for acts which ought to be punishable as criminal. Within what are generally recognized as the territorial limits of states by the law of nations, a state can define its boundaries on the sea and the boundaries of its counties; and by this test the commonwealth of Massachusetts can include Buzzard's bay within the limits of its counties." Therefore the "jurisdiction of the State of California over the sea is that of an independent nation" (Humboldt Lumber Manufacturers' Ass'n v. Christopherson, 9 Cir., 73 F. 239, 19 C.C.A. 481, 44 U.S.App. 434, 46 L.R.A. 264, 282), with the right to decide and prescribe its own boundaries.

[4, 5] The extent of territorial jurisdiction is primarily a question for the lawmaking power. See Note 46 L.R.A. p. 268. In the case entitled La Ninfa, 9 Cir., 75 F. 513, 518, it was said that in such controversies doubtful questions not thus decided are beyond the sphere of judicial cognizance and must be met by the appropriate department of the state. It is true that the legislature has not expressly designated the boundaries of the state. But the fundamental law (Const. art. XXI, sec. 1) has declared that the territorial bounds of the state shall include the bays and harbors along its coast; and in enacting the Fish and Game Code the legislature has followed the constitutional declaration in

---

[1] See Moore, Digest of International Law, vol. 1, p. 742.

respect to the waters of Santa Monica bay. Moreover, it is doubtful whether the legislature, in view of the constitutional section, could renounce a right of territorial domain or abdicate any rights of dominion over waters which for a period of at least 400 years have been considered to be a bay, and over which the state has exercised territorial jurisdiction. Ocean Industries, Inc. v. Superior Court, 200 Cal. 235, 252 P. 722; Mahler v. Transportation Co., 35 N.Y. 352. And certainly this court will not presume to do what the legislature could not do. What was said in the case of Ocean Industries, Inc. v. Superior Court, supra, also serves to refute any inferences which might otherwise be considered to flow from legislative acts fixing the boundaries of Los Angeles county and the city of Santa Monica. See Stats.1850, p. 59; Muchenberger v. City of Santa Monica, 206 Cal. 635, 638, 275 P. 803. In the absence of any controlling legislative or executive act or judicial decision, the court will look to the international law, namely, the customs and usages of civilized nations. The Paquete Habana, 175 U. S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320. But resort to the law of nations does not disclose any agreed definition of what constitutes a bay which may be included within the territorial waters of a state. See, also, Ocean Industries, Inc. v. Superior Court, supra, 200 Cal. page 246, 252 P. 722. On the contrary, as the foregoing discussion indicates, the usage and custom appears to be established to the effect that where, as here, the facts are that the bay is not and cannot become a pathway between nations; that exclusive jurisdiction has been asserted under both the present and former governments; that it has been recognized as a bay and as a harbor within the territorial boundaries of the state as prescribed by the law of the land, the courts have decided in accordance with the jurisdictional claim.

[6] That a state has policing jurisdiction over its territorial waters may be said to be settled by the authorities herein cited. See, also, Cunard S. S. Co. v. Mellon, 262 U.S. 100, 43 S.Ct. 504, 507, 67 L.Ed. 894, 27 A.L.R. 1306. In that case it was said: "It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. * * * 'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.'" Quoting from opinion of Chief Justice Marshall, in The Exchange v. M'Faddon, 7 Cranch 116, 136, 3 L.Ed. 287.

In line with the foregoing considerations the Bay of San Pedro (United States v. Carillo, D.C., 13 F.Supp. 121), and Monterey bay (Ocean Industries, Inc., v. Superior Court, 200 Cal. 235, 252 P. 722), have been judicially recognized as territorial waters of the state. There is not such a difference between the configuration and expanse of those bays and of Santa Monica bay as would compel the invocation of the "rule of reason" referred to in the Carrillo case, for the purpose of rejecting the contention that Santa Monica bay is within the territorial boundaries of California. That rule of reason does not persuade us to conclude that the waters of Santa Monica bay, per se, beyond three miles from the shore, constitute a part of the open or high seas. We are not here concerned with a body of water comparable to the Behring sea, or to the Gulf of Mexico mentioned as an example in the Carrillo case.

[7] We conclude that geographically the waters known as Santa Monica bay conform to the definition of a bay; that historically for a period of at least 400 years they have been known as a bay and during a large portion of that period have been used as a harbor; that the claimed jurisdiction of the executive department of the state is in conformity with the law of nations; therefore, that Santa Monica bay is one of the bays and harbors included within the territorial boundaries of the state by the constitution. It follows that the jurisdiction of the state extends over the waters of Santa Monica bay landward from a line drawn between its headlands,

Point Vicente and Point Dume, and at least for a distance of three miles oceanward from that line, and that such jurisdiction may be exercised by the state for all proper purposes including the prosecution of violators of the penal laws of the state.

The judgment and the order are and each is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; GIBSON, J.; CARTER, J.

Mr. Justice HOUSER did not participate in the foregoing decision.

35 Cal.App.2d 700

PRICE v. SCHROEDER.

Civ. 2344.

District Court of Appeal, Fourth District, California.

Dec. 4, 1939.

1. Trial 🔑400(1)

Where trial court made findings of fact and entered judgment for defendant in action for injuries, on motion for new trial, trial court was authorized to amend or change the findings to support the judgment for defendant. Code Civ.Proc. § 662.

2. Negligence 🔑100

Where negligence of plaintiff is of such character that it contributes to and becomes part of an inducing cause of defendant's willful misconduct, no recovery can be had though generally ordinary negligence of plaintiff is not a defense upon which defendant may rely when complaint is based upon charge of willful misconduct.

3. Automobiles 🔑226(2)

Where automobile guest knowing that host had completed day's work and had had no sleep from seven o'clock in morning of day preceding accident which occurred at twenty minutes after four o'clock on following morning served liquor to and drank with host from eight o'clock on night preceding accident until four o'clock in morning when he entered automobile which, as a result of host's becoming drowsy, crashed into pole, injuring guest, guest could not recover for injuries since the mental condition of host which was the basis of the charge of willful misconduct was induced by active participation of guest.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Luther A. Price against Walter J. Schroeder for injuries sustained while riding in an automobile as a guest of the defendant. From an adverse judgment plaintiff appeals.

Affirmed.

C. H. Van Winkle, of San Diego, for appellant.

Luce, Forward & Swing, Fred Kunzel, and Herbert Kunzel, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for injuries received by the plaintiff while riding in an automobile as a guest of the defendant. The complaint contained two causes of action, one alleging intoxication of the defendant and the other wilful misconduct. The answer alleged that the plaintiff did not exercise ordinary care or prudence to avoid the accident and that his resulting injuries were directly and proximately contributed to and caused by his own fault and negligence. During the trial the first cause of action, based upon intoxication, was dismissed.

Findings of fact were signed and filed on November 25, 1938, and on the same day a judgment was entered in favor of the defendant. The plaintiff moved for a new trial and in denying that motion and "as a part of said order" the court, after stating that the findings of fact and conclusions of law had been inadvertently signed, directed that they be amended and changed in certain respects as set out in the order. The amended findings were filed on January 31, 1939, and on the same day a judgment was entered in favor of the defendant. The plaintiff again moved for a new trial, which motion was denied, and this appeal was taken from the second judgment.

In the amended findings it is found that at about 4:20 o'clock a. m. on January 1, 1938, the plaintiff was riding as a guest in an automobile which was being driven along a certain highway by the defendant. It is then found as follows:

"II. That it is true that at said time and place, said defendant continued to drive his said automobile after he had knowledge of the fact that he was in a sleepy and drowsy condition, and that it is true that a short time prior to the accident in question, and while driving his said automobile, the defendant had become drowsy, and that it is true that the accident in question resulted by reason of the fact that the defendant had gone to sleep, and thereby allowing said car to run into a telephone pole on the right hand side of the road.

"III. That it is true that the plaintiff had knowledge of the fact that the defendant had been working at his place of business on the day preceding the accident, and that the plaintiff had knowledge that the defendant had not had any sleep from approximately 7 o'clock a. m. on the day preceding the accident up to the time of said accident. That between approximately 8 o'clock p. m., and 11 o'clock p. m., on the night preceding the accident, the plaintiff served to the defendant and to three other members of the party at his home, more than five whiskey sours each; that during said time the plaintiff used approximately three pints of whiskey in the making of said whiskey sours. That most of said drinks were had before dinner. That the said party proceeded to Tia Juana and arrived at Tia Juana at approximately 12 o'clock m., and that between 12 o'clock m., and 4 o'clock a. m. the defendant consumed in plaintiff's presence approximately five glasses of beer, one whiskey sour, and one Scotch whiskey and soda. That it is true that the plaintiff should have had knowledge that because of defendant's activities and drinking the defendant in driving his car would have a tendency to become sleepy and drowsy, and that it is true that the injuries to plaintiff resulting from said accident were proximately caused by his own acts in serving liquor to defendant and drinking with defendant, and by his own carelessness and negligence in entering the said automobile with knowledge then and there of the facts hereinbefore found."

The conclusions of law are: that the accident resulted from the wilful misconduct of the defendant, that the plaintiff was guilty of contributory negligence, and that the plaintiff take nothing by reason of his complaint.

[1] The appellant first contends that the original findings did not support the original judgment and that the court was without power to amend or change the findings after a judgment had been entered. This contention is without merit in view of section 662 of the Code of Civil Procedure, adopted in 1929. Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138; Bureau of Welfare, etc., v. Drapeau, 21 Cal.App.2d 138, 68 P.2d 998.

It is next contended that the defense of contributory negligence on the part of a plaintiff is based upon and relates to ordinary negligence upon his part, and that such negligence cannot defeat a recovery against a defendant who was guilty of wilful misconduct. Assuming, but not holding, that continuing to drive an automobile after he has knowledge of the fact that he is in a sleepy and drowsy condition constitutes wilful misconduct on the part of a driver, the point raised is of no avail to the appellant under the facts here found.

[2] In considering a like contention in a case involving somewhat similar facts the court, in Schneider v. Brecht, 6 Cal. App.2d 379, 44 P.2d 662, 664, said:

"While it is true, generally speaking, that ordinary negligence on the part of a plaintiff is not a defense upon which a defendant may rely when the complaint is based upon a charge of willful misconduct, this overlooks a principle which we think must be considered, to wit: That where the negligence of the plaintiff is of such a character that it contributes to, and really becomes a part of, and the inducing cause of the defendant's willful misconduct, no recovery can be or should be had. * * *

"While the words 'intoxication' and 'wilful misconduct' are used in the same sentence, and appear to be conjoined, we think that the intent of the Legislature was that the willful misconduct should be something different and apart from the acts and conduct of one whose reckless driving is superinduced by intoxication, that is to say, if the acts of the driver which would be classed as willful misconduct if not laboring under the influence of intoxicating liquor, when induced and brought about by the use of intoxicating liquor, then and in that case the action is to be regarded solely as the result of drunken driving or driving while one is under the influence of intoxicating liquor, and though the acts apparently are willful, intentional, and reckless, yet if, as found by the court, they proximately resulted from the use of intoxicating liquor, and the circumstances of the case show that the guest was a participant in the drunken orgy in all the acts and events which led up to the intoxicated condition, recovery cannot be had, for the simple reason that both parties are equally culpable. * * *

"The efficient cause in the instant case was intoxication, intoxication superinduced by the active participation of the plaintiff, and we find no line of demarkation separating the result from the cause, upon which the plaintiff can rely, and at the same time hold the defendant liable in damages.

"The case cited by the appellant to the effect that ordinary negligence constitutes no defense to a charge of willfulness or wantonness, we think inapplicable where the facts show that the plaintiff was guilty of every act complained of, as against the defendant, and participated in bringing about the mental condition of the defendant which culminated in the collision."

In that case the court quoted from Spillers v. Griffin, 109 S.C. 78, 95 S.E. 133, L.R.A.1918D, 1193, including the following:

"If there is no law to allow the defense of contributory willfulness, so there is no law that allows a plaintiff to recover when he has himself contributed willfully as a proximate cause to the injury. The plaintiff must show his right to recover in law and in fact."

[3] The salutary principle announced in Schneider v. Brecht, supra, was followed in Reposa v. Pearce, 11 Cal.App.2d 517, 54 P.2d 475. The appellant seeks to distinguish these cases on the ground that there was no positive finding of intoxication in the instant case. The court here found that the respondent became drowsy and sleepy as a result of drinking a large quantity of liquor and of his activities through practically an entire night following a day's labor, and further found that the appellant should have known that these things would cause the respondent to become drowsy, and that the injuries to the appellant were proximately caused by his own acts in serving liquor to the respondent and drinking with him, and by his own negligence in entering the automobile with knowledge of the other facts found. In principle, this case cannot be distinguished from the cases cited, although the finding is that the accident resulted by reason of drowsiness which naturally followed a night of drinking, rather than a specific finding of complete intoxication. The inducing cause of the mental condition of the respondent, which is the basis of the charge of wilful misconduct on his part, was the large amount of liquor he had consumed, and his nocturnal activities, in connection with all of which the appellant had been a most active participant. The appellant was equally at fault in bringing about the very mental condition of which he complains and which led to the accident.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

---

35 Cal.App.2d 710

BARCROFT v. LIVACICH et al.

Civ. 2454.

District Court of Appeal, Fourth District, California.

Dec. 5, 1939.

Hearing Denied Feb. 1, 1940.

1. Ejectment 🔑108

A motion for nonsuit in action of ejectment by executrix of deceased record title holder against persons who were alleged to have wrongfully ousted title holder from possession and thereafter continued to withhold possession unlawfully and without right was properly denied.

2. Ejectment 🔑1

In ejectment, the "matter in litigation" is the alleged right to the possession of the demanded premises on part of plaintiff, and her ouster by defendants, rather than title to land.

3. Ejectment 🔑69

Where legal title to property is admittedly in plaintiff, defendants cannot successfully defend against action in ejectment unless they make out in their answer a complete equitable title in themselves with right of possession thereunder.

4. Vendor and purchaser 🔑299(1)

Where a vendee in possession under a contract of purchase has failed to perform his part of the contract and is in default in respect thereto without excuse, he cannot maintain an equitable defense to an action in ejectment by vendor who is the holder of the legal title.

5. Evidence 🔑271(16)

Declarations of a person, since deceased, not against, but in support of, his own interests, and made outside the presence of the party sought to be bound by them are not admissible in favor of those who claim rights which the declarations would maintain. Code Civ.Proc. § 1946.

6. Evidence 🔑271(16)

Declarations of a person, since deceased, not against, but in support of, his own interests, and made outside the presence of the party sought to be bound by them, have no greater force as evidence in an action brought subsequent to the death of the declarant than they would have in an action brought by him in his lifetime. Code Civ. Proc. § 1946.

7. Evidence 🔑119(1), 271(16)

An administrator may not prove the mere declarations of decedent in his own favor but may prove his acts under a contract sued upon and secure the admission of declarations made at the time, as res gestæ. Code Civ.Proc. § 1946.

8. Evidence 🔑220(3)

When a grantor has parted with title to property, his acts and declarations in disparagement thereof, made in the absence of the grantee, are inadmissible, but whenever in a particular action the issue itself is whether grantor has parted with title, his subsequent acts and declarations are admissible as bearing on the question of delivery.

9. Landlord and tenant 🔑108(2)

Refusal to accept past-due rental payments under lease with option to purchase was justified, to preserve right to declare a forfeiture.

10. Vendor and purchaser 🔑95(2), 101

A vendor by accepting payments after the times specified in agreement for sale of real property waives provision with reference to time being the essence of the contract as to those payments and cannot thereafter effectually declare a forfeiture of vendee's right to purchase and of payments already made without notice that in the future a strict performance will be required.

11. Estoppel 🔑63

Alleged estoppel to assert title must be based on some degree of turpitude.

12. Estoppel 🔑93(5)

The executrix of landlord under lease with option to purchase was not estopped from asserting title after tenants had failed to comply with terms of option, by fact that tenants had made valuable improvements, in good faith.

13. Lost Instruments 🔑8(3)

The evidence relied upon to establish the contents of a lost instrument must show without reasonable doubt the substantial parts of the instrument, and testimony of a witness with respect thereto need not be accepted as true merely because there is no direct evidence to contradict it.

14. Payment 🔑65(6)

In action in ejectment, the burden of proving claimed payments under allegedly lost contract of purchase or option was on defendants.

15. Equity 🔑66

One who appeals to a court of equity to defend him against title to land of which he is in possession must do equity by paying the price which he agreed to pay, under the maxim that he who seeks equity must do equity.

16. Landlord and tenant 🔑284(1)

Tenants who in resisting ejectment relied on alleged contract or option to purchase were not entitled to retain possession and withhold agreed purchase price.

17. Ejectment 🔑26(2), 27

In ejectment, wherein plaintiff's title was admitted, defendants could only prevail by setting up an equitable defense of such character that the equity might be ripened by a decree into a complete equitable title in defendants and of a legal right to possession of the premises, or such a right as would estop plaintiff from prosecution of action.

18. Landlord and tenant 🔑280½

Where neither heirs of deceased property holder nor administratrix of her estate knew of the nature of the tenancy of those by whom property was occupied, administratrix was not required to tender deed and demand performance under contract of purchase alleged to exist by those in possession, before bringing an action in ejectment

against them, particularly where it appeared that demand for payment of amount due under contract or option would have been futile. Probate Code, § 850.

◆

Appeal from Superior Court, Riverside County; William D. Dehy, Judge.

Action in ejectment by Hattie J. Barcroft, as executrix of the estate of Floretta Fraser, deceased, against Clara Livacich and another, wherein cross-complaint was filed to establish and determine the provisions of an alleged contract of purchase or option. Judgment for plaintiff, and defendants appeal.

Affirmed.

Charleville & Weddell and Martin Coughlin, all of San Bernardino, for appellants.

Albert Ford, of Riverside, for respondent.

GRIFFIN, Justice.

[1] This was an ordinary action in ejectment filed January 5, 1937. Respondent, at the trial, established proof of her representative capacity, the record title to the property in Floretta Fraser, deceased, and claimed that appellants wrongfully ousted her from possession of the premises and that they continued to withhold possession thereof unlawfully and without right. After the production of this evidence respondent rested her case. Appellants moved for a non-suit, which motion was denied and they thereafter produced evidence in an endeavor to establish their claim of right of possession as alleged in their answer and sought by way of cross-complaint to establish and determine the provisions of a contract of purchase or option claimed to have been entered into between appellants and Floretta Fraser, which contract or option was alleged to have been lost or destroyed. The ruling of the trial court denying the motion for nonsuit was quite proper. Hicks v. Lovell, 64 Cal. 14, 27 P. 942, 49 Am.Rep. 679.

The salient facts necessary to a comprehensive understanding of the issues presented may be thus summarized: Appellant John Livacich testified generally that subsequent to 1919 he became interested in hotel property which belonged to Mrs. Fraser, the deceased, known as the Banning Hotel. In 1924, Mrs. Fraser deeded this hotel property to Mr. Livacich and his then partner, Anton Gilich. A note for $27,000, together with $11,000 cash was the consideration. Thereafter other notes were given by them to Mrs. Fraser over a period of years. In 1931 a trust deed note in the sum of $40,000 was executed on the hotel property and apparently covered all of the outstanding notes. In May, 1924, at the request of Livacich, Mrs. Fraser purchased adjacent property consisting of several lots on which was located a large house known as the Bramkamp place. When an attempt was made to sell the Bramkamp property to Livacich, he interviewed Mrs. Fraser with whom he had other business dealings and proposed to her that she buy the Bramkamp place for $4,500 and that they later would buy it back from her and give her a commission of $300 upon the deal. Thereupon, Mrs. Fraser bought the property and Livacich and Gilich signed an agreement or option to buy back the place for $4,800. It reads as follows:

"July 22nd, 1924.

"This is to certify that Floretta Fraser Miller (name subsequently changed back to Fraser) agrees to let Livacich and Gil*l*ich have the rent of the place bought by her from Dr. Bramkamp for the rent of the rooms now occupied by her at the San Gorgonio Inn, and Livacich and Gil*l*ich agr*ee*s to same, for one year from the date they can get possession of said Bramkamp place. Mrs. Fraser Miller is not to be at any expense, on the Brampkamp place and the place is to be kept up house and grounds by Livacich and Gil*l*ich in good shape. Livacich and Gil*l*ich are to have an option to buy in one year, at three hundred dollars net advance over purchase price paid by Mrs. Miller and other expenses incurred by Mrs. Fraser Miller for the year, providing all interest has been paid on San Gorgonio Inn and *2000* cash can be paid on house and lot.

"John Livacich. Anton Gilich."

In 1927 Livacich and Gilich dissolved their partnership. It does not appear if or how the 1924 agreement was disposed of or transferred by Gilich. Livacich testified that some time after taking possession, he went to Mrs. Fraser and advised her that he wanted to improve the Bramkamp place so that he could use it in connection with the hotel and therefore wished to enter into a contract of purchase with her; that Mrs. Fraser agreed and that the parties then executed a written contract whereby Livacich agreed to purchase the Bramkamp property from Mrs. Fraser for $4,800, and to pay any expenses which she had incurred in connection therewith; that Mrs. Fraser agreed to sell the property to him at that price.

Appellants claimed in their answer and this received some support in the testimony of John Livacich, that the lost contract of sale contained additional provisions other than those set out in exhibit 7, which were to the effect that the sums due under the agreement were to be paid as follows: "Thirty five ($35.00) Dollars on or before the last day of each calendar month after the execution of this contract of purchase; * * * that when the defendants have paid to Floretta Fraser one-half (½) of the sum due under this contract of purchase, said Floretta Fraser shall execute and deliver to the defendants a grant deed conveying to said defendants title to said property; and at such time defendants shall execute and deliver to the said Floretta Fraser a promissory note bearing interest at the rate of five (5) per cent per annum for the balance of the money due under said contract * * * and said promissory note and interest shall be payable at the rate of thirty-five ($35.00) dollars per month, each installment to be paid on or before the last day of each calendar month following the date of execution * * * and to secure such promissory note defendants shall execute a deed of trust * * * on said property;" that it was further agreed that the rental due from Mrs. Fraser to Livacich for rooms in the Banning Hotel which were occupied by her and which it was agreed would amount to $35 per month, together with all charges against Mrs. Fraser for meals furnished her by Livacich at the hotel as long as she lived there, were to be credited on that contract against the purchase price.

Livacich testified that thereupon he entered into an extensive improvement campaign upon the premises and expended in the neighborhood of $7,000 therefor; that from time to time Livacich and Mrs. Fraser had an accounting relative to the contract in question and that in January, 1935, the last of these accountings took place, and it is claimed by appellants that it was then determined that Livacich owed Mrs. Fraser $3,208.

In December, 1935, the hotel caught on fire. After the fire the office was claimed to have been ransacked and many papers destroyed. Shortly thereafter, Livacich was sentenced to prison on a manslaughter charge arising out of an automobile accident in which he had been involved. Upon his return from prison he stated that he attempted to locate the contract in question but up to the time of trial he had been unable to do so.

During his absence the appellant Clara Livacich had attempted to care for his affairs but she was unable to locate the contract in question. In May, 1930, Mrs. Fraser had her insurance agent rewrite her policy of insurance on the Bramkamp property and requested the attachment of a rider reciting that she was selling the property in question to John Livacich under a contract of sale and providing for payment to herself and Livacich as their interests might appear.

The existence of the original of the lost contract or option under which the property was being purchased, was substantiated further by the testimony of other witnesses. All of the testimony concerning the contents of the lost contract and its terms was quite indefinite.

Respondent, on cross-examination of appellant John Livacich, and after he had testified to the facts in relation to the terms of the claimed lost contract of sale, offered in evidence, over appellants' strenuous objections, exhibits 6, 7, 3, 8, and 9. Exhibit 7 reads as follows:

"July 2nd, 1927.

"This is to certify that Floretta Fraser agrees to let John Livacich have the rent of the place bought by her from Dr. Bramkamp, for the rent of the rooms now occupied by her at the San Gorgonio Inn, so long as she cares to occupy them. Mrs. Fraser is not to be to any expense on said Bramkamp place, except taxes, and Ins. John Livacich to have option to buy in six months after she leaves rooms should she decide to do so, by paying $35.00 rent for Bramkamp place per month, for said 6 mo. and *300.00* advance over purchase price, and other expenses incurred by Mrs. Fraser, a copy of which is here made to date, and *2000* cash providing all interest has been paid on San Gorgonio Inn. Balance on trust deed @ 8% quart. Mrs. Fraser to be repaid for taxes, & insurance, but no interest to be charged for same."

On the reverse side of the exhibit, in the handwriting of Mrs. Fraser, is an itemized statement of taxes and insurance paid by her. Exhibit 6 is similar in wording and substance as exhibit 7, with few exceptions, and exhibits 3, 8 and 9 contain certain accounting statements in the admitted handwriting of Mrs. Fraser, which were found among her papers. Exhibit 8 was a minute account of the purchase price and expenses advanced up to 1935 by Mrs. Fraser on the Bramkamp property, totaling $6,056.59, with a notation thereon that "John Livacich has option to buy". Exhibit 9 purportedly was a similar account in reference to the $40,000 trust deed transaction, showing interest unpaid thereon since 1931, in the approximate sum of $18,000, less deductions for meals as itemized in exhibit 3. On December 17, 1936, according to the pleadings, the deed of trust upon the hotel property was foreclosed *for nonpayment of interest amounting to more than $10,000.*

The court found generally that the parties duly executed the option agreement (exhibit 5) dated July 22, 1924, and the agreement (exhibit 7) dated July 2, 1927, and that the endorsements thereon were in the handwriting of Mrs. Fraser and that they were the only contracts made between the parties respecting the Bramkamp property; that "John Livacich and Clara Livacich have been in possession of said property since July 2, 1927, pursuant to said contract of July 2, 1927, and not otherwise"; that Mrs. Fraser paid taxes and expenses on the property in the sum of $303.90 from May, 1924, to July 2, 1927, and the sum of $1,252.68 for said purpose from July 2, "1937" (1927) until her death; that appellants made repairs to the property at a cost in excess of $4,000 with the knowledge of Mrs. Fraser and without objection by her, but that she did not "encourage said work".

Appellants claim that the credit for room and meals furnished Mrs. Fraser should have been credited to the contract for the purchase of the Bramkamp property. Respondent claims and the court found that the charges for meals and other incidentals furnished her under their agreement should have been and were applied to the interest and indebtedness due under the $40,000 trust deed on the Banning Hotel property; that the appellants did not pay the sum of $2,000 mentioned in the agreement or any part thereof and did not pay the taxes or expenses on the property which were advanced by Mrs. Fraser nor the interest due on the indebtedness secured by the trust deed on the Banning Hotel property nor the $4,800 due on the purchase price of the Bramkamp property nor the $35 per month rent due for that property for six months after the death of Mrs. Fraser occurred on April 17, 1936, as set forth in their agreement.

It was further found that appellants offered to pay $35 rent in May, 1936, and $35 in December, 1936, but that those payments were not accepted and no other or further payments were offered; that accountings were had from time to time between the parties during the life of the contract, but that it was not true that it was ever determined that the balance of the purchase price was $3,280 as claimed by appellants; that the only right of appellants to possession of the property was pursuant to the agreement dated July 2, 1927 (exhibit 7); that respondent was not estopped, as pleaded by the appellants, from asserting her rights under the agreement, by virtue of her claimed acts and conduct in allowing appellants to improve the property in the manner above mentioned; that on December 17, 1931, appellants entered into possession of the premises without right, and unlawfully ousted respondent from possession, and continued to so withhold possession without lawful right. The court gave judgment for the possession of the premises and damages in the sum of $600 for unlawful withholding of the same. From this judgment appellants have perfected this appeal.

Appellants contend that the judgment in question should be reversed upon the following grounds: (1) that it was prejudicial error to admit in evidence plaintiff's exhibits 3, 6, 7, 8 and 9, upon the ground that they were self-serving, private memoranda; (2) that the evidence established, without conflict, that the plaintiff was estopped to deny the existence of defendant's rights in the property in question; and (3) that the evidence was insufficient to sustain the findings of fact and that the findings did not sustain the judgment.

[2-4] It must be borne in mind that in an action in ejectment, the matter in litigation is the alleged right to the possession of the demanded premises on the part of the plaintiff, and her ouster by defendants, and not the title to the land. Porter v. Garrissino, 51 Cal. 559. It is the rule in this state that where the legal

title to the property is in the plaintiff and that fact is admitted by the defendants, as is the case here, defendants cannot successfully defend against an action in ejectment unless they make out in their answer a complete equitable title in themselves with the right of possession thereunder. Wallace v. Maples, 79 Cal. 433, 21 P. 860; Flint v. Conner, 53 Cal.App. 279, 200 P. 37; Dorn v. Baker, 96 Cal. 206, 31 P. 37; Meeker v. Dalton, 75 Cal. 154, 16 P. 764. The decisions of this court are replete with the announcements of the above principles and we need not here pause for further citations. Where a vendee in possession under a contract of purchase has failed to perform his part of the contract and is in default in respect thereto without excuse, he cannot maintain an equitable defense to an action in ejectment by the vendor who is the holder of the legal title. Connolly v. Hingley, 82 Cal. 642, 23 P. 273; Howard v. Hewitt, 139 Cal. 614, 73 P. 414; Helm v. Wilson, 76 Cal. 476, 18 P. 604; Flint v. Conner, supra.

Appellants contend that under the circumstances of this case the admission of the exhibits above enumerated was prejudicial error, citing Ringland v. Hockensmith, 99 Cal.App. 66, 71, 277 P. 902; Thompson v. Oreña, 134 Cal. 26, 30, 66 P. 24; sec. 1946, Code Civ.Proc.; Ensign v. Southern Pac. Co., 193 Cal. 311, 320, 223 P. 953; Harper v. Goldschmidt, 156 Cal. 245, 250, 104 P. 451, 28 L.R.A.,N.S., 689, 134 Am.St.Rep. 124; Lynch v. Bekins Van & Storage Co., 31 Cal.App. 68, 71, 159 P. 822; Rulofson v. Billings, 140 Cal. 452, 459, 74 P. 35; Kerns v. Dean, 77 Cal. 555, 19 P. 817.

[5-7] Declarations of a person, since deceased, not against, but in support of his own interests, and made outside the presence of the party sought to be bound by them, are not admissible in favor of those who claim rights which the declarations would maintain. Steinberger v. Young, 175 Cal. 81, 165 P. 432. They have no greater force as evidence in an action brought subsequent to the death of the declarant than they would have in an action brought by him in his lifetime. Fischer v. Bergson, 49 Cal. 294; Bedell v. Scoggins, 5 Cal.Unrep. 66, 40 Pac. 954. Although an administrator is not permitted to prove the mere declarations of the decedent in his own favor, he is entitled to prove his acts under a contract sued upon and any declarations made at the time and characterizing them as part of the res gestae. Mattingly v. Pennie, 105 Cal. 514, 39 P. 200; 10 Cal.Jur. § 331, p. 1100.

[8] When a grantor has parted with title to property, his acts and declarations in disparagement thereof, made in the absence of the grantee, are inadmissible in evidence; but whenever in a particular action the issue itself is whether the grantor has parted with title, it is the settled rule of law in this state that his subsequent acts and declarations are admissible as bearing on the question of delivery. In Belser v. American Trust Co., 125 Cal. App. 344, 13 P.2d 951, certain memoranda were found among decedent's personal effects and were held admissible as tending to show his interest in the property. It does not appear, however, from the authorities cited that the exhibits complained of in the instant case were admissible.

[9, 10] Respondent was fully justified in refusing payment of two months' rent on the premises. It has been repeatedly decided and is undoubtedly the law of this state that a vendor by accepting payments after the times specified in the agreement for sale of real property, waives any provision with reference to time being the essence of the contract as to those payments and cannot thereafter effectually declare a forfeiture of vendee's right to purchase and of payments already made without notice that in the future a strict performance will be required. Watkins v. Warren, 122 Cal.App. 617, 10 P.2d 500.

[11, 12] Appellants contend that respondent was estopped to deny that they agreed to purchase the property in question from Mrs. Fraser because of the fact that the latter stood by and saw the former erect improvements on the property under the belief that they were purchasing the same, citing Burrow v. Carley, 210 Cal. 95, 104, 290 P. 577; and Farley v. Vaughn, 11 Cal. 227, 237.

It is clear from the evidence before us that the trial court was justified in finding against appellants upon the plea of estoppel. From an examination of the agreement dated July 22, 1924, admittedly signed by John Livacich, which was properly received in evidence without objection, although poorly phrased, it could be properly termed an option to purchase the property upon the conditions therein set forth. It is apparent that appellant John

Livacich did not fulfill the conditions of the option nor did he tender the $2,000 mentioned or pay the interest on the trust deed. He was therefore accordingly in default under that option. The trial court has construed this instrument in connection with exhibit 7 as an option to purchase the property by appellants and has, by its findings, established the claim under which the only right of appellants to possession of the property could be predicated. It appears from the evidence that appellants are in default under their option to purchase under either instrument or under appellant's own version of the terms of the lost contract or option. No tender of the consideration or adequate offer to perform was made in accordance with the terms thereof. Champion Gold Min. Co. v. Champion Mines, 164 Cal. 205, 128 P. 315.

The contract or option was in contemplation of improvements. The fact that improvements were made is no ground for altering the contract or option. It seems to be the rule that to establish estoppel there must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title; and accordingly the trial court was justified in finding that respondent was not estopped in this action by the fact that appellants in good faith constructed improvements on the lands claimed by them. Holzer v. Read, 216 Cal. 119, 13 P.2d 697; Humboldt County v. Van Duzer, 48 Cal.App. 640, 192 P. 192; Frazier v. Murphy, 133 Cal. 91, 65 P. 326.

It was held in Gervaise v. Brookins, 156 Cal. 103, 103 P. 329, that a vendee in possession of land, under a contract which entitles him to a conveyance of the fee thereof and to remain in possession only so long as he makes the payments of the purchase price as agreed, who has paid a substantial part of the price and made valuable improvements on the land, and is able, willing and ready, and has offered to pay the balance upon receipt of a good title, but who does not wish to rescind and refuses to make further payments except on condition that he receives a good title, is not entitled to remain in possession against the vendor who has no title and is unable to transfer it.

[13] The rule of law regarding sufficiency of evidence to establish the contents of a lost instrument is well stated in the case of Caine v. Briscoe, 78 Cal.App. 660, 248 P. 774, 777, where the court comments on "placing sole reliance, for the support of an important issue, upon the frailties, or, as truly may be said, the treachery, of human memory, the burden of proving the fact necessarily carries with it more than the usual measure of responsibility". Also in Deacon v. Bryans, 88 Cal.App. 322, 263 P. 371, it was held that the evidence must show without reasonable doubt the substantial parts of the instrument and that the testimony of the witness need not be accepted as true, merely because there is no direct evidence to contradict it, as evidence may, within itself, bear the earmarks of falsity.

The testimony of appellant John Livacich was impeached in many ways. His statement of the contents of the claimed lost instrument was so vague and uncertain that any court would be justified in disregarding his entire testimony in relation thereto. Bailey v. Moshier, 35 Cal. App. 345, 349, 169 P. 913. No weaker kind of testimony can be produced than the unsupported testimony of a single person, as to a conversation between himself and a deceased person. Mattingly v. Pennie, supra.

[14] Appellants were permitted to remain in possession of the property for more than nine years while Mrs. Fraser paid all taxes and insurance thereon. They failed to pay the purchase price of the property and interest on the $40,000 trust deed as agreed. The burden of proof of all claimed payments on the alleged lost contract or option was on appellants. Griffith v. Lewin, 125 Cal. 618, 58 P. 205; 20 Cal.Jur., p. 952, § 30.

[15, 16] One who appeals to a court of equity to defend him against title to land of which he is in possession must do equity by paying the price which he agreed to pay. The maxim "he who seeks equity must do equity" applies to him in full force. Appellants, under the circumstances of this case, were not entitled to hold possession and withhold the purchase price. Empire Investment Co. v. Mort, 169 Cal. 732, 147 P. 960.

[17] The fact of title being in respondent was admitted by appellants in their answer. Therefore they could only prevail against her by setting up an equitable defense. The equity presented must be of such a character that it may be ripened by a decree into a complete equitable title

in themselves and a legal right to the possession of the premises or such a right as will estop her from the prosecution of the action. Verbeck v. Clymer, 202 Cal. 557, 261 P. 1017.

It appears to us that there is sufficient evidence in the record without the use of the objectionable exhibits, to substantiate the findings of the trial court in reference to some option to purchase. Conceding that these exhibits should not be considered in reference to the option to purchase, it is clear that the court has wholly disregarded appellants' testimony and in effect has found that his testimony did not establish a contract of purchase as represented by him, the terms of which had been fulfilled by him, and which would give him an equitable title with the right of possession of the property.

[18] Appellants contend that under any of the circumstances involved in this action, before Livacich could be placed in default the respondent, before filing her action in ejectment, was required to tender a deed and demand performance under the contract alleged by Livacich or the agreement which the court found to exist, citing Boone v. Templeman, 158 Cal. 290, 297, 110 P. 947, 139 Am.St.Rep. 126; and Bank of America v. Ries, 128 Cal.App. 75, 77, 16 P.2d 1018.

It appears that neither the heirs of Floretta Fraser, deceased, nor the administratrix of her estate knew, nor were they informed of the nature of the tenancy of appellants. It would therefore be a mechanical view of the law if it, previous to the filing of the action for ejectment, required the administratrix under the circumstances here related to demand performance of a claimed lost contract which she never knew existed. She likewise had no means of knowing the terms of it until the trial court found that one did exist and declared its terms after the filing of the answer and cross-complaint. There would be no duty on the part of the administratrix to tender a deed when she, as administratrix, had no legal authority so to do. Sec. 850, Probate Code; Mayer v. West, 96 Cal.App. 31, 273 P. 849. The possession, therefore, became wrongful as against the respondent administratrix and no demand for possession was necessary on the part of the respondent before bringing the action of ejectment. Joy v. McKay, 70 Cal. 445, 11 P. 763. It appears further that a demand for payment of the amount due under the contract or option as found by the court would have been futile because of one fact, at least, that the trust deed had been foreclosed on the hotel property, through the fault of appellants, for nonpayment of interest, and therefore the payment of that amount as a condition precedent would be not only exorbitant compared to the value of the property here involved but would be a condition practically impossible of performance at that time. Under such circumstances, a demand would have been unnecessary. Bruschi v. Quail Mining, etc., Co., 147 Cal. 120, 81 P. 404; Briles v. Paulson, 170 Cal. 408, 149 P. 804.

Appellants having failed to meet the burden cast upon them to prove their right of possession, the trial court, notwithstanding the errors complained of, was fully justified in its ultimate finding in favor of respondent and in entering judgment thereon.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

35 Cal.App.2d 723

In re USELDINGER.

Civ. 11081.

District Court of Appeal, First District,
Division 2, California.

Dec. 6, 1939.

1. Names 🔑20

The common-law right to change one's name has not been abrogated by statute, and change may be accomplished without resort to legal proceedings. Code Civ.Proc. §§ 1275–1279.

2. Names 🔑20

The purpose of the statutory procedure for change of name is to establish a change of name as a matter of record, and it is only under peculiar circumstances that a court will be justified in denying an order changing a petitioner's name. Code Civ.Proc. §§ 1275–1279.

3. Names ⚿20

Where, for more than 14 years before filing of petition to change name, petitioner had exercised right to change his name and was thereafter generally known by the changed name, changed name constituted petitioner's legal name as much as if he had borne it from birth.

4. Names ⚿20

Whether petition for change of name will be granted depends upon particular facts. Code Civ.Proc. §§ 1275–1279.

5. Names ⚿20

Where remonstrant showed that name adopted by petitioner was similar but not same as his own, and that as a result of use of a small temporary sign announcing petitioner's entrance into tavern business, some persons thought remonstrant had interest in such business in which he had not and had never been engaged, and there was no element of unfair competition involved, denial of petition to change name of petitioner, who for 14 years was known by changed name under which he married and conducted tavern business and by which he was generally known, was error. Code Civ.Proc. §§ 1275–1279.

6. Names ⚿20

Until the common-law right to change one's name is abrogated by statute, courts should encourage, rather than discourage, the filing of petitions for change of name to the end that such changes may be a matter of public record. Code Civ.Proc. §§ 1275–1279.

◆

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Proceeding in the matter of the application of Harold Verne Useldinger for a change of name. From an order denying the petition, petitioner appeals.

Reversed, with directions.

Walter H. Duane, of San Francisco, for appellant.

P. Paul Vlautin, Jr., of San Francisco, for respondent.

SPENCE, Justice.

Petitioner filed his petition under sections 1275–1279 of the Code of Civil Procedure seeking to change his name to James J. Britt. The trial court, after a hearing, made its order denying said petition and petitioner appeals from said order.

Said petition was filed and the order was entered in 1938. At that time petitioner was 26 years of age. The evidence showed that he was born in the state of Washington; that he had resided there until he was 22 years of age, at which time he came to San Francisco; that at the age of 12, he had adopted the name of James J. Britt and had been known by that name or as Jimmy Britt at all times thereafter; that he had never heard of remonstrant James Edward Britt at that time but was acquainted with Frank Britt, a fighter, and liked the name of Britt so he chose the name James J. Britt; that he had thereafter become a fighter; that he had married under the name of James J. Britt and that his wife and child had been known at all times by the name of Britt; that the birth certificate of his child had been filed under the name of Britt; that he had not used the name of Useldinger for over 14 years; that after coming to San Francisco, he had managed taverns for several years and, at the time of the hearing, he and Frank Pachiano were operating a tavern of their own, located on Eddy street in San Francisco and known as the "Little Louvre"; that he had never heard of remonstrant, James Edward Britt, until seven or eight years before filing his petition; and that he desired to change his name to James J. Britt because he was and had been known by that name during all of the time mentioned.

While James Edward Britt filed no objections showing good reason against such change of name (Code Civ.Proc., § 1278), he appeared as a remonstrant and introduced some evidence. Said evidence showed that he had been at one time a well-known professional fighter but had retired from the ring in 1910; that he had thereafter been a vaudeville actor but it does not appear how long he had followed that vocation; that he had been in the plumbing business with his father before becoming a fighter but had never engaged in any business or vocation other than those herein mentioned; that at the time of the hearing, he was a W. P. A. worker, but had an intention "to open a place in the Exposition". It further appears that for approximately two weeks after petitioner and his partner acquired the tavern known as the "Little Louvre", a banner approximately three by five feet in size was displayed announcing that the place has changed hands and was being operated under the management of Frank Pachiano and Jimmy Britt. The remonstrant James Edward Britt testified that San Francisco had been his home city; that he had first heard of petitioner when some people spoke to him about the sign thinking that he was in the tavern business; and that "there was some of them had gone in there. We laughed about it." When asked, "What did they relate to you what happened?" he answered, "When the young man appeared, he was much younger and better looking than I was, they knew it was not me". He further testified that he went into the tavern and asked petitioner if Jimmy Britt was around; that petitioner answered, "Yes, I am Jimmy Britt"; that he said, "That's funny, so am I"; that petitioner said, "Oh, you are the old timer?"; that he said, "I feel younger"; that he then asked petitioner if he was going to take the sign down; that petitioner said no and "I exited laughingly".

Upon this showing, the trial court denied the petition. Petitioner contends that the trial court abused its discretion in so doing and in our opinion this contention must be sustained.

[1, 2] The common law right to change one's name has not been abrogated by statute in this state and such change may be accomplished without resort to legal proceedings. In re Ross, 8 Cal.2d 608, 67 P.2d 94, 110 A.L.R. 217; Ray v. American Photo Player Co., 46 Cal.App. 311, 189 P. 130; Everett v. Standard Accident Ins. Co., 45 Cal.App. 332, 187 P. 996. As the above-mentioned code sections were enacted in affirmation of that right and for the purpose of establishing a change of name as a matter of record, it is only under peculiar circumstances that a court will be justified in denying an order changing a petitioner's name.

These principles are clearly stated in In re Ross, supra, where the court said 8 Cal.2d at pages 609 and 610, 67 P.2d at page 95, 110 A.L.R. 217, "The common law recognizes the right to change one's personal name without the necessity of legal proceedings, and the purpose of the statutory procedure is simply to have, wherever possible, a record of the change. [Citing cases.] Hence Mr. Ross may, regardless of the present petition, use the name of Keith if he desires. And in keeping with the object of the statute, a court to which he applies should normally make its decree recording such change of name. * * * This provision [Code Civ.Proc., sec. 1278] permits the court in the exercise of its discretion to deny the application, but if such discretion is abused, it is, of course, subject to correction on appeal. * * * We do not mean to suggest that the lower court must in every case grant a petition in proper form for change of name, but it is our view that some substantial reason must exist for the denial, and that none appears in the record before us."

[3] We find no substantial reason for the denial of the petition in the present case. On the other hand, petitioner presented very substantial reasons for the granting of the petition. More than 14 years before the filing of the petition, petitioner had exercised his legal right to change his name to James J. Britt. Thereafter petitioner had consistently used and had been generally known by the last-mentioned name and it constituted petitioner's "legal name, just as much as if he had borne it from birth". Ray v. American Photo Player Co., supra, 46 Cal.App. page 314, 189 P. page 131. The purpose of the petitioner in filing this proceeding was to establish a legal record of that which he had already legally done many years before.

In opposition to the petition, remonstrant merely showed that the name which had been adopted by petitioner was similar to but not the same as his own and that as a result of the use of a small, temporary sign, announcing petitioner's entrance into the tavern business, some persons had thought that remonstrant had entered said business. There was no showing, however, of any fraud practiced upon, or of any invasion of any legal right of, remonstrant or any other person. Remonstrant was not and never had been engaged in the tavern business and there was no element of unfair competition involved. As no substantial reason appeared for denying the petition, we conclude that the trial court should have granted it.

[4-6] In reversing the order of the trial court, we do not mean to imply that every petition for change of name must be granted or that the trial court may deny a petition only upon a showing of actual fraud or the actual invasion of the legal rights of another. Each case must stand upon its own particular facts in determining whether a trial court has abused its discretion in denying the petition. We are

of the opinion, however, that as the petitioner here had constantly used and had been generally known by the adopted name over a long period of years, it did constitute an abuse of discretion to deny him a legal record of such change upon the unsubstantial showing made in opposition to his petition. Until such time as the common law right to change one's name may be abrogated by statute, the courts should encourage rather than discourage the filing of petitions for change of name (In re Slobody, Sup.Ct., 173 N.Y.S. 514) to the end that such changes may be a matter of public record.

The order is reversed with directions to the trial court to grant the petition.

We concur: NOURSE, P. J.; STURTEVANT, J.

---

36 Cal.App.2d 35

PEOPLE v. BEARD.

Cr. 3257.

District Court of Appeal, Second District, Division 1, California.

Dec. 11, 1939.

1. Robbery 🔑24(1)

Conviction of first degree robbery was sustained by the evidence.

2. Criminal law 🔑589(1)

Where defendant's counsel was ready to proceed with the trial, the fact that defendant disagreed did not constitute ground for continuance.

3. Criminal law 🔑594(1), 1151

An application for continuance on the ground of the absence of witnesses is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons.

4. Criminal law 🔑594(1)

Where cause had been reset for trial almost a month in advance of the actual date of trial, denial of continuance asked for because of absence of witnesses and disagreement between defendant and his counsel was not prejudicial error under the facts disclosed by the record.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Byron L. Beard, alias Fred S. Simpson, was convicted of robbery in the first degree and assault with a deadly weapon, and from judgment of conviction and from order denying his motion for new trial on the ground that the evidence was insufficient to sustain the judgment, and that the court erred in refusing to grant defendant a continuance for the purpose of securing new counsel and additional witnesses, he appeals.

Judgment and order appealed from affirmed.

Byron L. Beard, in pro. per.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was convicted of the crimes of robbery in the first degree and assault with a deadly weapon the jury finding that he was armed at the time of the commission of the offenses, as well as at the time of his arrest, appellant admitting a prior conviction of felony, as alleged in the information.

This appeal is prosecuted from the judgment of conviction and from the order by which appellant's motion for a new trial was denied, upon the grounds that (1) the evidence is insufficient to sustain the judgment; (2) the court erred in refusing to grant appellant a continuance for the purpose of securing new counsel and additional witnesses.

On October 1, 1938, one Bernard L. Sweney was the manager of a cigar store located at 5340 Crenshaw boulevard in the city of Los Angeles and was admittedly operating therein a bookmaking establishment where bets on horseracing were made and accepted. Late in the afternoon of that day between 5 and 5:30 o'clock, appellant entered said establishment carrying a large revolver in his right hand and announced to the said manager and the eight or ten people there assembled: "I am a police officer, everybody in the back room * * * on your stomachs." Several people followed his directions and others ran out of the back door. The witness Kistler refused to go into the back room and grappled with appellant whereupon the latter struck him in the head rendering him unconscious. The witness Sweney had $100 in money and a 15 jewel white gold Waltham watch in his pockets and the witness Vanderwilt had $20 in his pocket all of which property was missing when appellant left after warning his victims to remain on their faces for five minutes after his departure. The witness Sweney testified that he saw something in appellant's hand which looked like a gun and while he was lying on his face on the floor in the back room a hand was placed in his pockets and his money and watch were removed; that he was unable to identify appellant as the man who entered his place of business except that the man so entering wore a light grey suit similar to the suit worn by appellant at the time of the trial. The witness Kistler testified on cross-examination that when he heard the voice say "Get into the back room" he looked up and saw appellant holding a revolver in his right hand moving it back and forth and at the time of trial he identified People's exhibit one as the gun which he saw in appellant's hand or as one exactly like it.

The witness Fitzgerald, a florist, whose place of business was located one door south of the cigar store, testified that while standing on the sidewalk in front of his shop he saw appellant come out of the cigar store and walk south on Crenshaw boulevard to Fifty-fourth street, where he crossed the street and turned on Fifty-fourth street to Eleventh avenue and then continued south on Eleventh avenue to the middle of the block where he was arrested by two deputy sheriffs.

Deputy Sheriff Stefan testified that he was in the vicinity of the premises in question around 5:30 in the afternoon of October 1, 1938, and observed appellant draw a revolver from his waist and at the trial he identified people's exhibit one as the gun taken from appellant at the time he apprehended him. A police officer of the city of Los Angeles, who arrived at the scene shortly after appellant was arrested by the two deputy sheriffs, searched appellant and found upon his person $108 in bills and a white gold 15 jewel Waltham watch, which he identified at the trial and which was identified in turn by Mr. Sweney as the watch which was taken from him as he lay on the floor in the back room of his establishment.

There was introduced in evidence a conversation which took place on October 3d between appellant and officer Stefan, in which appellant purportedly stated to the said officer that on September 20, 1938, he met a man by the name of Martin at a café in Hollywood, who asked appellant if he wanted to make some money; that appellant said he did, whereupon Martin told him about holding up some bookmaking establishments with which said Martin was familiar and that the "bookies would not dare to squawk"; that appellant told Martin he had no gun and Martin said he would get one for him; that on October 1st appellant drove with Martin to the Crenshaw boulevard address and Martin pointed out the place to him that they drove to Fifty-fourth and Eleventh avenue and parked the car on the west side of Eleventh avenue just south of Fifty-fourth street; that appellant got out and walked to the cigar store where he committed the robbery and assaulted a person, and then returned to Eleventh avenue where he was to meet Martin and found that Martin and the car were gone.

Appellant took the stand in his own defense and testified that he had placed bets with Sweney and had lost $160; that after losing his money he returned and tried to get the money back, but Sweney told him he had lost the money and could not get it, and that appellant was an ex-convict and he did not want him hanging around his place; that when he (appellant) took the money from Mr. Sweney he must have got the watch mixed in with the money and he did not know that he had the watch until the officers took it away from him; that he did not take money from anyone except from Mr. Sweney. Mr. Sweney was recalled as a witness for the prosecution in rebuttal and testified that his watch was in his watch pocket on the right side of his trousers and the money was in the left-hand pocket of his trousers.

In connection with his first point, appellant urges that the verdict is contrary to law in that under the circumstances, which he related in his testimony, he could not be convicted of the crime of robbery when he sought only to recover money which he had lost in an illegal game. In support of this contention he cites the case of People v. Rosen, 11 Cal.2d 147, 78 P.2d 727, 728, 116 A.L.R. 991, in which the defendant had frequented a tango parlor and had lost the sum of $1,000 playing tango. On the night in question he lost $55 and with the use of a revolver took $198 from the operator of the establishment and was subsequently charged with the crime of robbery. It was there held by the Supreme Court that "when the defendant seeks the recaption of money lost by him at an illegal game, * * * the intent to steal is lacking * * *, for the law recognizes no title or right to possession in the winner."

[1] In the cited case there was no question but that the defendant therein had lost money playing a gambling game at the place which he robbed. In the instant case, except for appellant's own testimony, there is not the slightest intimation that he had ever been inside the establishment before he committed the robbery, or that he had ever placed a bet with the manager Sweney. The evidence adduced at the trial is a complete demonstration of appellant's guilt of the crime charged in the information, and is amply sufficient to sustain the judgment of conviction.

Under his second point, appellant claims that the trial court did not afford him sufficient time within which to procure new counsel and obtain additional witnesses.

This is the second trial allowed the appellant, the judgment of conviction rendered at the first trial having been reversed by this court upon the ground that he was deprived of his constitutional right to aid of counsel in his defense, in that the trial court denied appellant's new counsel's motion for a continuance, and, despite said new counsel's statement that she could not represent appellant without time to prepare the defense, ordered the trial to proceed and it did proceed in the absence of any representation of appellant. People v. Simpson, 31 Cal.App.2d 267, 88 P.2d 175.

The clerk's transcript herein shows that on April 27, 1939, appellant and his counsel Edward J. McCurdy were present in department 41 of the superior court at which time trial was reset for June 2, 1939, and transferred to department 44, appellant waiving the statutory period; on June 2, 1939, Mrs. Gladys Towles Root was substituted for Edward J. McCurdy as attorney of record and the cause was transferred to department 40 for trial, and in the latter department appellant made a motion to have the trial continued to June 21, 1939, waiving statutory time.

When the cause was called for trial on June 21, 1939, appellant's counsel of record stated that she was ready but she understood that appellant wished to make a statement. Appellant then stated that his main witness was in Reno, Nevada, and would not be back for two weeks; that appellant had an understanding that he was to come down and plead guilty to assault with a deadly weapon and for that reason he did not have his witnesses there; that it was nine months since the crime was committed and that some of his witnesses had moved and some of them had died; and that he had the understanding, heretofore referred to, with his lawyer. On the other hand, Mrs. Root at that time stated that appellant was told that she was "working on a plea" and that "in the last analysis it would be up to the district attorney's office"; that for a period of two weeks she had tried to get witnesses together, tried to get the help of appellant's sister; that one witness had died five months previously; that another had left for an unknown destination, a third was in Reno and that appellant's sister was endeavoring to obtain his presence at the trial. Mrs. Root further stated that she had not obtained the witnesses referred to for the reason that she had been unable to get them. Appellant then stated he was having trouble with his attorney and would like to get another lawyer, and Mrs. Root said she would be happy to be relieved. Associate counsel McPherson then stated that he had called to the attention of appellant several times that witnesses had not been subpoenaed and that about three weeks previous to June 21st he had told appellant that they should be ready for trial and that up to the day previous to June 21st no names had been given to counsel as the witnesses necessary to be subpoenaed, and that as late as 10 o'clock that night counsel had made investigation in an effort to run witnesses down. After considerable discussion, during which appellant told the court he did not want Mrs. Root and Mr. McPherson to defend him and that they had done nothing in the case to help him outside of telling him he was going to plead guilty, the court stated that it felt it necessary to compel Mrs. Root to proceed to trial, and denied the request for a continuance. During the course of the trial, the court allowed Mrs. Root to confer with appellant on numerous occasions and on one occasion appellant stated that he wanted to talk to the public defender and be advised as to his constitutional rights, whereupon the court summoned Mr. John Hill of that office, and appellant and Mr. Hill conferred off the record.

[2, 3] Appellant's counsel was ready to proceed with the trial of the cause, and the fact that appellant disagreed does not constitute ground for continuance. An application for continuance on the ground of the absence of witnesses is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons. People v. Collins, 195 Cal. 325, at page 332, 233 P. 97, citing 5 Cal.Jur. 968.

[4] In view of the fact that the cause was reset for trial almost a month in advance of the actual date of trial, and taking into consideration all the facts and circumstances revealed by the record, the denial of a continuance did not constitute prejudicial error.

The judgment and order appealed from are, and each of them is, affirmed.

We concur: DORAN, J.; WHITE, J.

SHOWALTER v. WESTERN PAC. R. CO.*

Civ. 10890.

District Court of Appeal, First District, Division 2, California.

Dec. 4, 1939.

Hearing Granted Feb. 1, 1940.

1. Master and servant 🔑87

The basis of liability under the Federal Employers' Liability Act is negligence on part of the carrier. Federal Employers' Liability Act, §§ 1, 6, 45 U.S.C.A. §§ 51, 56.

2. Master and servant 🔑265(2)

In action under the Federal Employers' Liability Act, burden of proving negligence rests with the plaintiff. Federal Employers' Liability Act §§ 1, 6, 45 U.S.C.A. §§ 51, 56.

3. Commerce 🔑8(6)

Courts 🔑97(5), 489(9½)

An action may be brought under the Federal Employers' Liability Act in either a federal or state court, but the substantive rights of the parties are governed by the act as interpreted by the federal courts. Federal Employers' Liability Act, §§ 1, 6, 45 U.S.C.A. §§ 51, 56.

4. Commerce 🔑8(6)

Master and servant 🔑250¼

When an action is brought under the Employers' Liability Act in state court, the law of the state may be applied to procedural matters, but the question of the sufficiency of the evidence to support a verdict is one of substantive law and is not subject to control of the state. Federal Employers' Liability Act, §§ 1, 6, 45 U.S.C.A. §§ 51, 56.

5. Master and servant 🔑276(1)

In actions under the Federal Employers' Liability Act, the so-called scintilla of evidence rule is rejected and substantial evidence must be produced by plaintiff to sustain the burden of proof. Federal Employers' Liability Act, §§ 1, 6, 45 U.S.C.A. §§ 51, 56.

6. Master and servant 🔑276(1, 2)

The evidence produced to support an action under the Federal Employers' Liability Act may be either direct or circumstantial, but it must be substantial and show that negligence on part of carrier was proximate cause or one of proximate causes of accident. Federal Employers' Liability Act, §§ 1, 6, 45 U.S.C.A. §§ 51, 56.

7. Master and servant 🔑276(2)

Evidence which leaves determination of carrier's negligence as proximate cause of accident in realm of mere speculation is insufficient to support action under the Federal Employers' Liability Act. Federal Employers' Liability Act, §§ 1, 6, 45 U.S.C.A. §§ 51, 56.

8. Master and servant 🔑276(8), 278(18)

In action against railroad under the Federal Employers' Liability Act for death of brakeman from injuries sustained during switching operations, circumstantial evidence which at best left determination of cause and manner of happening of accident in the realm of mere speculation and conjecture was insufficient to sustain recovery. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

9. Master and servant 🔑87

Each case under the Federal Employers' Liability Act must stand upon its own particular facts. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

10. Master and servant 🔑250¼

The law of the state of California governs the admissibility of evidence in actions brought in the courts of California under the Federal Employers' Liability Act. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

---

*For subsequent opinion see 106 P.2d 895.

11. Evidence ⚷125

In action against railroad under the Federal Employers' Liability Act for death of brakeman from injuries sustained during switching operations, evidence of conversation between another brakeman and injured brakeman after accident when other brakeman found injured brakeman on track was erroneously admitted and could not be considered as "res gestæ" or for any purpose. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

[Ed. Note.—For other definitions of "Res Gestæ," see Words & Phrases.]

12. Master and servant ⚷265(2, 14)

Administratrix seeking recovery from railroad under the Federal Employers' Liability Act for death of brakeman could not rely solely on presumption of due care on part of brakeman for there was likewise a presumption of due care on part of railroad. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

13. Constitutional law ⚷70(3)

The state courts, in actions therein under the Federal Employers' Liability Act, and juries, must be guided by the terms of the act and the interpretation thereof by the federal courts, rather than by the belief that Congress should change its policy and provide for liability on part of carrier regardless of fault. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Ruth Ann Showalter, administratrix of the estate of Joseph W. Showalter, deceased, against the Western Pacific Railroad Company to recover damages for death of the deceased. From judgment for the plaintiff, and from order denying defendant's motion for judgment notwithstanding the verdict, defendant appeals.

Reversed, with directions.

Edwin V. McKenzie, Ernest I. Spiegl, Arthur B. Dunne, Duncan Low, and Dunne & Dunne, all of San Francisco, for appellant.

Clifton Hildebrand, of Oakland, and Goodman & Brownstone, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, as administratrix of the estate of Joseph W. Showalter, deceased, sought damages for the death of said deceased. Upon a trial by jury, plaintiff had judgment. Defendant appeals from said judgment and from the order denying its motion for judgment notwithstanding the verdict.

Plaintiff's complaint was in two counts. These counts sought respectively to charge defendant with liability under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., and the Federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq. It was alleged in the complaint and admitted by the answer that deceased was a brakeman in the employ of the defendant; that both deceased and defendant were engaged in interstate commerce at the time of the accident; that it was the duty of deceased at about 9 o'clock p. m. on the night in question to ride upon two freight cars in a switching operation at defendant's yard at Keddie, in which switching operation said cars were being dropped by the engine onto a track known as lower four in said yard; and that in said switching operation, deceased received injuries which resulted in his death. It was alleged in the first count and denied by the answer that defendant "carelessly operated and controlled said cars" thereby causing said injuries and death. Plaintiff was permitted during the trial to amend by adding the words "and engine". It was alleged in the second count and denied by the answer that the hand-brake on one of said cars was defective and that as a result of its defective condition said hand-brake "suddenly and unexpectedly released and let go" thereby throwing deceased upon the tracks and causing said injuries and death. The answer affirmatively alleged that the negligence of the deceased was the sole proximate cause of his death; that deceased was guilty of contributory negligence; and that deceased assumed the risk.

At the close of plaintiff's case, defendant made a motion for nonsuit with respect to the second count. Said motion was granted, as there was no evidence whatever of any violation of the Safety Appliance Act. Defendant also made a motion for nonsuit with respect to the first count. Before this motion was ruled upon, defendant withdrew it and made a motion for a directed verdict. Said motion was denied and the cause was thereupon submitted to the jury upon the evidence introduced by plaintiff. The jury returned its verdict in favor of plaintiff and judgment was entered thereon. Thereafter defendant made a motion for judgment notwithstanding the verdict upon the ground that the trial court should have directed a verdict in favor of defendant. Said motion was denied and this appeal followed.

The main contentions of defendant on this appeal are that the evidence was insufficient to sustain the verdict and that the trial court therefore erred in denying defendant's motion for a directed verdict and in denying defendant's motion for judgment notwithstanding the verdict. Our review of the record convinces us that these contentions must be sustained.

[1-4] Before proceeding to a consideration of the evidence found in the record before us, it appears appropriate to make certain observations which are pertinent in the discussion of the sufficiency of the evidence to support a verdict under the Federal Employers' Liability Act. Said act does not impose liability upon the carrier regardless of fault as do many state acts providing for so-called workmen's compensation rather than damages. On the contrary, the act provides that the carrier "shall be liable in damages * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence", in its equipment or appliances. U.S.C.A., title 45, § 51. It thus appears that the basis of liability under said act is negligence upon the part of the carrier and it is settled by the authorities hereinafter cited, that the burden of proving such negligence rests with the plaintiff in any action brought under said act. While an action may be brought under the act in either a federal or state court, U.S.C.A., title 45, § 56, the substantive rights of the parties are governed by the act as interpreted by the federal courts. Chicago M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 46 S.Ct. 564, 70 L.Ed. 1041. When such action is brought in a state court, the law of such state may be applied to procedural matters, but the question of the sufficiency of the evidence to support a verdict is one of substantive law and is not a question which is subject to the control of the state in which the action is brought. As was said in Chicago M. & St. P. R. Co. v. Coogan, supra, 271 U.S. at page 474, 46 S.Ct. at page 565, 70 L.Ed. 1041, "By the federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail, and all state laws upon that subject were superseded. [Citing cases.] The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the federal courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient * * * judgment against the carrier will be reversed. [Citing cases.]" See, also, New Orleans & N. E. R. Co. v. Harris, 247 U.S. 367, 38 S.Ct. 535, 62 L.Ed. 1167; Yazoo & M. V. R. Co. v. Mullins, 249 U.S. 531, 39 S.Ct. 368, 63 L.Ed. 754; Chesapeake & O. R. Co. v. Stapelton, 279 U.S. 587, 49 S.Ct. 442, 73 L.Ed. 861.

[5-7] It is clear under the federal decisions that the so-called scintilla of evidence rule is rejected and that substantial evidence must be produced by the plaintiff in order to sustain the burden of proof. Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 53 S.Ct. 391, 77 L.Ed. 819; Small Company v. Lamborn & Co., 267 U.S. 248, 45 S.Ct. 300, 69 L.Ed. 597; Gunning v. Cooley, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720; Southern Railway Company v. Walters, 284 U.S. 190, 52 S.Ct. 58, 76 L. Ed. 239; Chicago G. W. R. Co. v. Rambo, 298 U.S. 99, 56 S.Ct. 693, 80 L.Ed. 1066. Such evidence may be either direct or circumstantial but there must be substantial evidence, direct or circumstantial, to show that negligence on the part of the carrier was the proximate cause or one of the proximate causes of the accident. Evidence which leaves the determination of these essential facts in the realm of mere speculation and conjecture is insufficient. Pennsylvania R. Co. v. Chamberlain, supra; Chicago M. & St. P. R. Co. v. Coogan, supra; Atchison, T. & S. F. R. Co. v. Toops, 281 U.S. 351, 50 S.Ct. 281, 74 L.Ed. 896; Northern R. Co. v. Page, 274 U.S. 65, 47 S.Ct. 491, 71 L.Ed. 929; Atchison, T. & S. F. R. Co. v. Saxon, 284 U.S. 458, 52 S.Ct. 229, 76 L.Ed. 397; St. Louis S. F. R. Co. v. Mills, 271 U.S. 344, 46 S.

Ct. 520, 70 L.Ed. 979; Kansas City So. Ry. Co. v. Jones, 276 U.S. 303, 48 S.Ct. 308, 72 L.Ed. 583.

[8] It is conceded in the present case that the verdict must find support, if it does find support, in evidence which was circumstantial in nature. So far as the record discloses, there was no eye witness to the accident and there was no testimony showing just how and when the accident occurred. Three other employees of defendant were engaged in the switching operation in question, namely another brakeman, the engineer and the fireman. Plaintiff did not call the engineer or fireman, but relied upon the testimony of Parrott, the brakeman. There is no conflict in the evidence as the cause was submitted at the close of plaintiff's case and it therefore becomes necessary to examine the testimony of Parrott in some detail. The following facts are either admitted facts or are facts to which Parrott testified.

The Keddie yard is adjacent to the main line track and runs in a general easterly and westerly direction. It consists of four tracks which parallel the main line track. The grade there is a one per cent grade descending from east to west. A series of tracks and switches makes it possible to operate trains from the main line onto any of said four tracks, which are numbered from one to four from south to north, or to operate trains from any one of said four tracks onto any other of said four tracks. This series of tracks is known as a snake-lead, perhaps because of the figure which it makes in curving away from each track and straightening out at the next track as it progresses from a point on the main line track toward the east end of the yard over each of said numbered tracks to a point on track four toward the west end of the yard. In the photograph, the snake-lead appears as a continuous track pursuing a wriggling course in making the cross-over of the yard. The portion of each track to the east of the snake-lead is designated as "upper" while the portion to the west is designated as "lower".

The particular switching operation in which the crew was engaged was one involving three cars and the engine. Shortly prior to the accident, the engine stood on lower one coupled to these three cars. The order of the cars and engine from east to west was as follows: the water car, the gondola car, the refrigerator car and the engine. The pilot of the engine was headed east. In railroad parlance, a gondola car is referred to as a "gon" and a refrigerator car is referred to as a "reefer". The object of the switching operation was to place the gon and the reefer on lower four coupled to a cut of twelve cars which were then located on lower four; and to place the water car on upper four. The method to be pursued in accomplishing this object was as follows: The engine was first to push the three cars to upper one so that the entire unit would be clear of the switch located on track one; the water car was then to be uncoupled and left standing on upper one; the engine was then to give the reefer and gon a slight start and then uncouple and run back onto lower one; the switch to the snake-lead was to be thrown as soon as the engine crossed said switch and the reefer and gon were to be permitted to roll down across the snake-lead to a coupling with the twelve cars located on lower four; the switch on track one was then to be lined so that the engine could proceed from lower one to upper one and couple onto the water car; the switch on track one was then to be thrown again so that the engine and water car could proceed down the snake-lead to lower four from which point the engine was to push the water car into upper four. The cars were all approximately forty feet in length. It was apparently known to all members of the crew that the easterly end of the cut of twelve cars, standing on lower four, was approximately one hundred feet west of the switch on track four at the end of the snake-lead. With the reefer and the gon added thereto, there would remain only approximately twenty feet between the easterly end of the gon and said switch, which would obviously leave insufficient space for the engine and water car to enter lower four before entering upper four without first coupling to the fourteen cars, including the original twelve and the reefer and gon, and pushing them a short distance down lower four.

The deceased was the senior man of the crew and was in charge of this switching operation. He assigned Parrott to handle the switch on track one and to remain with the engine and water car during the balance of their movement. Deceased was to uncouple the engine from the reefer and gon after the engine had given them a rolling start on upper one and was then to ride said cars across the snake-lead and to a coupling with the twelve cars on lower four. The night was dark and it appears that the movement was intended to be and was carried out at a slow speed of perhaps two or three miles per hour. The deceased had to roll down with the two cars "feeling his way" as did Parrott with the engine and water car, the pilot of the engine and its headlight being pointed away from the direction of the movement down the snake-lead to track four.

The first part of the movement was carried out without any unexpected happening. The deceased uncoupled the reefer and the gon from the engine on track one and climbed to top of the reefer, which was the first of the two cars, as said two cars rolled slowly by the switch on track one and onto the snake-lead for the purpose of rolling over the snake-lead and coupling with the cars on lower four. The duty of deceased was to control said cars by means of the hand-brake and to bring them to a normal coupling. He was last seen before the accident on top of the reefer at the west end thereof as the two cars passed Parrott who was standing at the switch on track one. Said cars rolled by and the balance of the crew proceeded with their duties in completing the switching operation.

Parrott then lined the switch on track one so that the engine could again proceed from lower one to upper one. The engine did so proceed and he rode the engine pilot to the place the water car was standing on upper one and coupled the water car to the pilot of the engine. He then went back to the switch on track one and threw said switch so as to permit the engine to proceed from upper one across the snake-lead to lower four. After throwing the switch, Parrott got on the footboard at the end of the tender, which was in front of the engine, at the left side or engineer's side which was his proper position. The engine then proceeded by backing slowly over the snake-lead. Parrott did not see the light of the deceased and there was nothing to prevent him from seeing it if it had been on the top of the cars. While the engine was still backing and when the front of the tender upon which Parrott was riding had arrived at a point in the vicinity of the switch on track four, Parrott first heard the deceased holler. It was "a holler as if someone were in pain or distress in some way". If deceased had been hollering before that time, Parrott did not believe he could have heard him "because the engine was rolling, and because of the distance I was from him." Parrott ran over to the north side of the gon and found deceased lying across the north rail of track four underneath the gon, possibly halfway between the trucks of the gon. The reefer and the gon had already rolled down to a coupling with the twelve cars on lower four. Deceased's head was toward the north and his feet were toward the inside of the track. He had been run over and while he was still conscious and spoke to Parrott when Parrott arrived, he died shortly thereafter as a result of his injuries.

The remaining testimony throws but little light on the manner of the happening of the accident. Parrott was qualified as an expert and gave certain testimony regarding the proper and customary manner of riding cars under the circumstances which deceased rode the two cars. He testified that the proper place for a man to ride under the circumstances was on top of the reefer, the leading car, near the brake which was at the west end of said reefer. It is assumed by the parties, however, from other evidence that deceased fell to the ground between the east end of the reefer and the west end of the gon. This assumption seems to be made because apparently only the westerly trucks of the gon ran over the deceased; his light was found between the rails near his feet; there were certain marks found along the east end of the reefer; and on the following morning deceased's brake club was found by Parrott in the grab-iron at the west end of the gon. While it appears that the movement could have been controlled from the brake platform of the gon, which was the second car, Parrott testified that "a man could not very easily see where he was going if he stood on the brake platform of the gondola". He further testified, "I do not know of anything that would make it advisable to do so. I do not know of any reason at all why he should have done so."

It seems to be plaintiff's theory that the two cars on which deceased was riding had either stopped or were still rolling at a point where the west end of the reefer was about half a car length from the east end of the twelve cars on track four and that the engine then struck the east end of the gon and caused the deceased to be thrown to the ground between said cars. This would furnish a possible explanation of the accident if there were any evidence to support it, but we find none. There was no evidence of any contact whatever between the engine and the gon nor was there any evidence to show that the reefer and gon had not rolled to their intended coupling with the twelve cars prior to the time that the engine arrived at a point near the switch on track four. As above stated, plaintiff called only one witness to testify regarding the events occurring on the evening of the accident. That witness was Parrott who rode the end of the tender and was in a position to know if any contact had been made. He did not testify that any such contact had been made. Under repeated questioning the most that he would say was that he could not remember. His other evidence indicates that there was no such contact. Realizing that it was essential under the circumstances to establish such contact in order to sustain the verdict herein, plaintiff takes the position that the jury was entitled to accept portions of Parrott's testimony and to disregard others. But if the jury was entitled to disregard portions of Parrott's testimony, even though he was uncontradicted and unimpeached, the result is that there is no other evidence remaining to sustain plaintiff's theory.

We find some discussion in the briefs of the probabilities but if it be assumed that the jury was entitled to deal in probabilities in arriving at its verdict, the weight of the probabilities was not in accord with plaintiff's theory or any theory which would sustain the verdict. On the contrary, it appears more probable that deceased sustained his fatal injuries by falling from the cars to the ground prior to the time that the engine arrived near the switch at track four and without causal negligence on the part of the defendant. At best, the evidence left the determination of the cause and manner of happening of the accident in the realm of mere speculation and conjecture and under these circumstances, it must be held that plaintiff failed to sustain the burden of proof. As was said in Atchison, T. & S. F. Ry. Co. v. Saxon, supra, 284 U.S. at page 460, 52 S. Ct. at page 230, 76 L.Ed. 397, "What occasioned this distressing accident can only be surmised. It was necessary to show causal negligence in order to establish the respondent's right to recover. The evidence fails to meet this requirement." And again in New York Central R. Co. v. Ambrose, 280 U.S. 486, it is said at page 490, 50 S. Ct. 198, at page 199, 74 L.Ed. 562, "The utmost that can be said is that the accident may have resulted from any one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough."

[9] Both parties have called to our attention numerous other authorities presenting varying factual situations. We find none precisely in point and it is conceded that each case must stand upon its own particular facts. We therefore refrain from discussing these numerous authorities as the rules appear to be well settled. It is simply a question of applying settled rules to the evidence presented in the record before us.

[10, 11] One other item of evidence should be mentioned. Over the objection of defendant, there was admitted in evidence a conversation had by Parrott with the deceased after the accident had happened and after Parrott had found the deceased in the position above indicated. Said conversation was admitted upon the theory that it was part of the res gestae. It appears unnecessary to discuss the doubtful probative value, if competent, of the rather ambiguous statement made by the deceased. It was introduced by plaintiff upon the theory that it had some value as a purported narrative concerning the happening of the accident, but it is clear that it was inadmissible and incompetent. Such evidence has been consistently held to be inadmissible and incompetent in this state ever since the early case of People v. Ah Lee, 60 Cal. 85. See Durkee v. Central Pacific R. Co., 69 Cal. 533, 11 P. 130, 58 Am.Rep. 562; People v. Wong Ark, 96 Cal. 125, 30 P. 1115; Williams v. Southern Pacific Company, 133 Cal. 550, 65 P. 1100; Murphy v. Board of Police etc. Com'rs, 2 Cal.App. 468, 83 P. 577; People v. Murphy, 28 Cal.App. 708, 153 P. 732; Salvo v. Market Street Ry. Co., 116 Cal.App. 339, 2 P.2d 585. As was said in Williams v. Southern Pacific Company, supra, 133 Cal. at page 554, 65 P. at page 1102, "Expressions of persons who are actors, made during the occurrence, may generally, but not always, be proved. If spontaneous and caused by the event, they may nearly always be shown. But if afterwards, no matter how shortly afterwards, there is an attempt to explain what has happened, or to account for it, or to defend one's self, or the like, it is incompetent and inadmissible as res gestæ." Plaintiff urges a contrary rule which prevails in some jurisdic-

tions, but the law of this state governs the admissibility of evidence in actions brought in the courts of this state under the Federal Employers' Liability Act. Goulette's Adm'r v. Grand Trunk Ry. Co., 93 Vt. 266, 107 A. 118. We therefore conclude that evidence of said conversation was erroneously admitted over the objection of defendant and that it may not be considered for any purpose.

[12, 13] In conclusion, we may state that while the evidence showed the nature of switching operation, the duties assumed by the deceased and the approximate time and place of the accident, said evidence left the cause of the accident veiled in mystery. As above stated, it was incumbent upon plaintiff to show that negligence on the part of defendant caused said accident. Plaintiff could not rely solely upon the presumption of due care on the part of the deceased for there was likewise a presumption of due care on the part of the defendant. Looney v. Metropolitan R. Co., 200 U.S. 480, 26 S.Ct. 303, 50 L.Ed. 564. Plaintiff produced no substantial evidence to meet the burden thus imposed, and the determination of the essential facts was left in the realm of mere speculation and conjecture. Perhaps the verdict was returned because of the feeling upon the part of the jurors that it is the policy of the law of this state to award compensation to injured employees and the dependents of deceased injured employees regardless of fault on the part of such employees or their employers. But this policy has not been adopted by congress with respect to employees, such as the deceased, as to whom Federal Employers' Liability Act applies. On the contrary, the policy adopted by congress, as expressed in said act, is to impose liability upon the carrier only upon a showing that fault on the part of the carrier caused the injuries. There are those who believe that congress should change that policy and provide for liability on the part of the carrier regardless of fault but until that policy is thus changed, the state courts and juries must be guided by the terms of the act and the interpretation thereof by our federal courts.

From what has been said, it follows that the trial court erred in denying defendant's motion for a directed verdict and in thereafter denying defendant's motion for judgment notwithstanding the verdict.

The judgment and the order appealed from are reversed with directions to the trial court to grant defendant's motion for judgment notwithstanding the verdict.

We concur: NOURSE, P. J.; STURTEVANT, J.

---

35 Cal.App.2d 740

BLACHE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11214.

District Court of Appeal, First District, Division 1, California.

Dec. 7, 1939.

1. Prohibition 🔑10(1)

One of the essentials to the issuance of a writ of prohibition is that the party against whom it is directed is threatening to perform an act in excess of its jurisdiction.

2. Depositions 🔑71

A witness refusing to be sworn by notary taking deposition or to testify cannot be punished until an order is made requiring him to perform his duty. Code Civ. Proc. § 1991.

3. Prohibition 🔑5(3)

Where superior court had not made an order requiring plaintiff to be sworn by and to give testimony before a notary public, writ of prohibition was granted prohibiting the superior court from proceeding to punish plaintiff for alleged contempt in refusing to be sworn by and give deposition before the notary public. Code Civ.Proc. § 1991.

◆

Prohibition proceeding by Anna J. Blache against the Superior Court of the state of California in and for the City and County of San Francisco and Hon. T. I. Fitzpatrick as judge of such court to prohibit the respondent from proceeding to adjudge and punish the petitioner for alleged contempt of court.

Petition for peremptory writ of prohibition granted.

Max H. Margolis and Herbert Chamberlin, both of San Francisco, and E. Max

Cohen, and Milton A. Krug, both of Los Angeles, for petitioner.

Edward J. Lynch, of San Francisco, for respondents.

WARD, Justice.

This is a petition to prohibit the superior court of the state of California in and for the city and county of San Francisco from proceeding to adjudge and punish petitioner Anna J. Blache for alleged contempt of court in refusing to be sworn by, and give a deposition before, a notary public.

The petition alleges that a subpoena for the taking of a deposition in a maintenance action wherein petitioner was plaintiff was issued and served on petitioner; that she attended at the time and place mentioned therein, but, upon the advice of her attorneys, refused to be sworn or to give testimony. A report by the notary upon such refusal was duly filed, whereupon the respondent court issued an order to petitioner to appear and show cause why she should not be punished for contempt, the court finding in an order subsequently made that petitioner "has been guilty of contumacy of the court and is now in contempt of this court". A requested provision, however, that the action be dismissed was stricken from the order. In this connection, no order of court was made requiring petitioner to be sworn and perform the omitted acts. Respondent court has filed a demurrer and an answer to the herein petition.

The petition sets forth that the court has threatened and signified an intent to adjudge petitioner guilty of contempt and to dismiss her action against defendants in the suit in connection with which the subpoena was issued. The question of any threat to dismiss the action seems to be moot. The prayer of the petition requests relief from any punishment. During the oral argument respondents indicated that further action was contemplated. Petitioner may still be punished in the future in this proceeding in some other manner. Havemeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192; Traffic Truck Sales Co. v. Justice's Court of Red Bluff Tp., Tehama County, 192 Cal. 377, 220 P. 306.

[1-3] One of the essentials to the issuance of a writ of prohibition is that the party against whom it is directed is threatening to perform an act in excess of its jurisdiction. We find it necessary, therefore, to grant the present petition instead of awaiting possible habeas corpus or certiorari proceedings. Van Tiger v. Superior Court, 7 Cal.2d 377, 60 P.2d 851; Commercial Bank, etc., v. Superior Court, 192 Cal. 395, 220 P. 422. The refusal of a witness to be sworn cannot be punished until an order is made requiring the performance of the complained of, omitted, act. Sec. 1991, Code Civ.Proc.; Merrill v. Superior Court, 33 Cal.App. 55, 164 P. 340; Golden State Co. v. Superior Court, 25 Cal.App.2d 176, 76 P.2d 728.

It is hereby ordered that respondents' demurrer be overruled and the petition for a peremptory writ of prohibition be granted.

We concur: PETERS, P. J.; GOODELL, J. pro tem.

---

36 Cal.App.2d 88

TOWNS v. TOWNS.

Civ. 10956.

District Court of Appeal, First District, Division 2, California.

Dec. 13, 1939.

1. Appeal and error 🔑1011(1)

Conflicting evidence alone cannot upset finding of trial court.

2. Wills 🔑743

In suit by one of three brothers who assigned one-fourth interest in decedent's residuary estate to half-brother, for cancellation of plaintiff's assignment, evidence supported finding that there was no confidential relation between plaintiff and his two brothers.

3. Wills 🔑743

A written assignment of part of residuary legatee's interest in decedent's estate, "in consideration of like assignments of like interests by each of the other residuary legatees," was supported by legal consideration, especially in view of presumption of consideration from the writing itself.

4. Wills ⚿743

Where attorney who prepared assignments by three residuary legatees to their half-brother of one-fourth interest in decedent's residuary estate tendered assignments to legatees, explaining that they should be filed in the estate proceedings, and legatees requested attorney to file assignments, there was a constructive delivery of assignments. Civ.Code, § 1059.

5. Attorney and client ⚿20
Witnesses ⚿67

An attorney, who prepared assignments by three residuary legatees to their half-brother of one-fourth interest in decedent's residuary estate, was not incompetent to testify in, or to defend, suit by one legatee to cancel such legatee's assignment, in absence of evidence of confidential relation between attorney and such legatee.

6. Trial ⚿36

In suit to cancel assignment of interest in decedent's estate, defendant was not required to prove allegations of his cross-complaint for decree quieting title to interest assigned where plaintiff voluntarily admitted "anything that I can admit" when defendant started to put in his proof.

7. Trial ⚿36

Where essential facts are admitted during trial, evidence to prove them becomes unnecessary.

◆

Appeal from Superior Court, Alameda County; Peter J. Crosby, Judge.

Suit by Benjamin Lincoln Towns against Royal E. Towns, to cancel an assignment of a portion of plaintiff's interest in a decedent's estate, wherein defendant filed a cross-complaint praying that his title to a fourth interest in the residue of the estate be quieted. From a judgment for defendant, plaintiff appeals.

Affirmed.

George Ingraham, of Oakland, for appellant.

John C. Stirrat and Heber James Brown, both of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to cancel an assignment of a portion of his interest in the Estate of William Towns, deceased. The defendant by cross-complaint prayed that his title to a fourth interest in the residue of the estate be quieted. Judgment was in favor of the defendant on his cross-complaint and against plaintiff on his complaint.

Plaintiff and Wallace and Henry Towns are brothers of the decedent William Towns. They were all named residuary legatees in his will. Defendant Royal Towns is a half-brother. He was not named in the will. While plaintiff was in New Orleans he was notified that William was seriously ill. He left immediately by automobile and arrived in Oakland at 5:30 p. m., December 15, 1936. He then learned that William was dead. He was in conversation with Wallace and Henry until 12 o'clock of that night. All three agreed to meet at a lawyer's office at 10 o'clock a. m. the following day. At that time the three were in consultation for about an hour and all agreed to execute an assignment to defendant Royal of a proportionate interest of each of their undivided one-third interest in the residue of the estate. Three separate assignments were prepared by the lawyer, each duly executed by all three brothers and left with the lawyer with instructions to file with the probate court. On April 29, 1937, the plaintiff made a formal revocation of his contract.

The case which appellant seeks to establish is that undue influence was used by his brothers while he was in a weakened mental and physical condition due to his long drive and to the grief over the death of William, that he stood in a confidential relation with his two brothers of which they took an unfair advantage; that there was no consideration for the assignment and no valid delivery to the assignee.

[1] The trial court found that there was no mental weakness on the part of appellant when he executed the assignment, and that he acted with full knowledge of what he was doing. The appellant does not attack this finding. He cites some evidence which is in conflict with that upon which the finding is based, but it is settled law that conflicting evidence alone cannot upset the finding.

[2] The court found that there was no confidential relationship between appellant and his brothers, and that appellant did not rely upon said brothers in executing said assignment, but acted independently and without influence or coercion. The appellant cites his own testimony that he would not have signed the paper if he had not had confidence in his brother Wallace.

The evidence of all the circumstances surrounding the transaction fully supports the finding; and that puts an end to this part of the controversy.

[3] The contention that the assignment was without legal consideration is without merit. Aside from the presumption of consideration from the writing itself it was part of appellant's testimony that the assignment was made upon the plea of Wallace that, since the will did not mention Royal (the defendant), "Henry and I have agreed to let Royal in. If you don't sign the paper there will be a big scandal and people will talk." But since the assignment was expressly made "in consideration of like assignments of like interests by each of the other residuary legatees", the mutual promises between the three brothers were sufficient consideration. Garratt v. Baker, 5 Cal.2d 745, 56 P.2d 225.

[4] The question of delivery of the assignment is simple. The evidence is that each of the three brothers executed practically identical assignments at the same time, that the lawyer who prepared them tendered each brother his assignment explaining that they should be filed in the estate proceedings, that all three requested the lawyer to file them. This constitutes a constructive delivery under the provisions of section 1059 of the Civil Code.

[5] Appellant argues that it was error to permit the lawyer who drew the assignment to testify and to permit him to appear in the "dual capacity" as attorney for the respondent. The burden of appellant's argument on the issues of unfair practice and undue influence rests upon his testimony that he had no legal advice from this lawyer. The evidence shows clearly that this lawyer acted merely as a scrivener to prepare the documents suggested by the brothers of appellant. There is no evidence of a confidential relation between appellant and the lawyer which would make the latter incompetent to testify or bar him from defending the case.

[6, 7] Finally appellant argues that there is no evidence to support the finding that the cross-complainant and respondent was entitled to have his title quieted to an undivided one-fourth interest in the residue of the estate. There is no contention that the parties did not intend and agree to assign to respondent such proportionate share of their one-third interest in the residue as would give to respondent and the three brothers an undivided one-fourth of the whole. The only contention is that respondent did not make proof of the allegations of his cross-complaint which would entitle him to a decree quieting his title to such one-fourth interest. A complete answer is that when respondent started to put in his proof appellant voluntarily admitted "anything that I can admit". It is axiomatic that when essential facts are admitted during the trial, evidence to prove them becomes unnecessary.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

---

35 Cal.App.2d 653

JORDAN v. RETIREMENT BOARD, SAN FRANCISCO CITY AND COUNTY EMPLOYEES RETIREMENT SYSTEM.

Civ. 10656.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1939.

Hearing Denied Jan. 29, 1940.

1. Constitutional law 🔑102(2)

Pension rights do not vest at time of enactment of pension law but only upon happening of a contingency or event upon which the right thereto accrues, and at any time before happening of such contingency, law granting such right is subject to alteration or repeal.

2. Constitutional law 🔑102(2)

Where a fireman's right to a pension under charter of city of San Francisco vested at time of his injury and retirement, his right to pension could not subsequently be taken away. St.1899, p. 340; St.1913, p. 1626, art. 9, c. 7, § 5.

3. Municipal corporations 🔑200

Where pension rights of widow of fireman did not come into being until enactment of the 1925 and 1929 amendments to San Francisco charter, and could not become a vested right until the death of her husband, and three years prior thereto such amendments were repealed by a new charter limiting pension rights of widows of firemen to widows, whom members married prior to the date of injury resulting in death, widow who was not married to fireman prior to the date of his injury was ineligible to a pension under the charter provision. St. 1913, p. 1626, art. 9, c. 7, § 5; St.1925, p. 1175, art. 9, c. 7, § 4; St.1929, p. 2018, art. 11, c. 7, § 5; St.1931, pp. 3078, 3080, §§ 169, 170.

4. Statutes ⚷263

Statutes should be given prospective and not retroactive effect, unless such latter effect is made compulsory by language of act.

5. Constitutional law ⚷190

The 1925, and 1929 amendments of the San Francisco charter relating to pension rights of widows of deceased firemen did not manifest any intent to operate retrospectively so as to confer vested rights on widow of fireman which could not be taken away by a subsequent repeal of the amendments. St. 1925, p. 1175, art. 9, c. 7; St.1929, p. 2018, art. 11, c. 7, § 5; St.1931, pp. 3078, 3080, §§ 169, 170.

6. Municipal corporations ⚷220(9)

A pension is not deemed to be a "bounty" or a "gratuity," but pension provisions become a part of the contemplated compensation for services rendered under pension statute and thus become a part of the contract of employment.

[Ed. Note.—For other definitions of "Bounty" and "Gratuity," see Words & Phrases.]

7. Constitutional law ⚷102(2)

A pensioner has no vested right to a specific sum as a pension, but that sum may be increased or decreased according to corresponding increases or decreases in the salary of the rank upon which the pension is based.

8. Constitutional law ⚷102(2)

The 1925 and 1929 amendments to the San Francisco charter relating to pension rights of widows of deceased firemen did not grant an increase in amount of pension of the firemen so as to vest a right thereto in the widow of a deceased fireman which could not be impaired by a subsequent repeal of the amendment prior to the time widow had obtained vested pension rights. St.1925, p. 1175, art. 9, c. 7; St.1929, p. 2018, art. 11, c. 7, § 5; St.1931, pp. 3078, 3080, §§ 169, 170.

9. Officers ⚷94

No public officer is entitled as of right to a pension.

10. Constitutional law ⚷70(1)

Eligibility to a pension is regulated by statute and where such eligibility does not exist, court cannot add it by construction to pension statute.

11. Constitutional law ⚷70(3)

Courts must take a statute as they find it and if its operation will result in inequality or hardship, the remedy therefor lies with the legislative authority.

12. Constitutional law ⚷70(1)

Where San Francisco charter provision required payment of a pension to a widow of a fireman dying from injuries received during performance of his duties, if widow was married to fireman prior to date of injury, and failed to provide for payment of pensions to widows of retired firemen who were married after their retirement, court could not construe pension statute so as to entitle a widow of a deceased fireman who married him after his injury and retirement, to a pension. St.1931, pp. 3078, 3080, §§ 169, 170.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Proceeding by Marion C. Jordan to compel the Retirement Board, San Francisco City and County Employees Retirement System, to grant plaintiff's application for a widow's pension. From a judgment sustaining defendant's demurrer to plaintiff's petition for a writ of mandate, plaintiff appeals.

Affirmed.

A. M. More and Peter Wedvig, both of San Francisco (E. B. Mering, of San Francisco, of counsel), for appellant.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for respondent.

KNIGHT, Justice.

Respondent's demurrer to appellant's petition for a writ of mandate was sustained without leave to amend, and from the judgment entered thereon this appeal is taken.

The purpose of the proceeding was to compel the respondent board to grant appellant's application for a widow's pension; and the facts of the case, as they are alleged in the petition for the writ, are as follows: Frank Jordan was appointed a member of the fire department of the city and county of San Francisco on March 31, 1905. In February, 1914, while engaged in the performance of his duties as a hoseman, he was overcome with smoke, which caused an asthmatic condition, and that same month he was retired on a pension. Some nine years later to-wit, in July, 1923, he married appellant, and the marriage relationship continued up to the time of his death, which occurred on August 31, 1935; and it is alleged that he died as the result of the ailment for which he had been retired. Shortly after his death appellant filed her application for a widow's pension, but it was rejected by the respondent board, whereupon she instituted the present proceeding.

The following are the charter provisions of the city and county of San Francisco necessary to be considered in determining the controversy: In 1905, at the time Jordan became a member of the department, and in 1914, at the time of his injuries and retirement, section 4, chapter VII, article IX, of the charter provided for an annual pension to be paid to any member of the fire department who became physically disabled by reason of any bodily injury received in the performance of his duty, the same "to be paid to him during his life and to cease at his death". St. 1899, p. 340. Also at the time of his injuries and retirement section 5, chapter VII, article IX, of the charter provided for a pension for the widow of a fireman who died as a result of injury sustained in the performance of duty within a year from the date of such injury. St.1913, p. 1626. In 1925, which, as will be noted, was ten years or more after Jordan's retirement and approximately two years subsequent to his marriage to appellant, said section 4 was amended, St.1925, p. 1175, whereby, among other things, this provision was added: "provided, that should said retired officer or member die leaving a widow, such widow shall, as long as she may remain unmarried, be paid an annual pension equal to one-half the salary attached to the rank held by the said officer or member of the department at the time of his retirement * * *." In 1929, St. 1929, p. 2018, section 5 was amended so as to provide that if a member of the fire department died as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of his duty, his widow, as long as she remained unmarried, was entitled to a pension equal to one-half of the salary attached to the rank held by the decedent at the time of his death. And in 1932, which, as will be observed, was some three years prior to Jordan's death, the city and county of San Francisco adopted a new charter, St.1931, p. 2973, wherein the provisions relating to "Present Retired Members and Present Beneficiaries, Fire Department", were embodied in section 170 thereof, St. 1931, p. 3080; and it was therein provided that any member who shall have been retired on or after January 1, 1900, and prior to January 21, 1925 (Jordan, it will be remembered, was retired in 1914) and shall be receiving a pension, shall continue to receive a pension throughout his life, "subject to the provisions of section 169 governing the payment of pensions granted because of disability incurred in the performance of duty, including the payment of such pensions to widows, * * *", etc.; and section 169. St. 1931, p. 3078 (entitled "Present Members of Fire Department") declares in part that "* * * (b) The family of any member of the fire department who shall die as a result of any injury received during the performance of his duty, or from sickness clearly, unmistakably and directly caused by and resulting from the discharge of such duty, * * * shall receive the following benefits: First, should the decedent leave a widow *to whom he was married prior to the date of the injury* resulting in death, his widow shall, as long as she may live and remain unmarried, be paid a monthly pension equal to one-half of the salary attached to the rank held by the decedent at the time of his said injury * * *." (Italics ours.)

[1-3] Petitioner claims no pension rights under the charter provisions which were in force at the time Jordan became a member of the department nor at the time of his injury and retirement, nor could she make such claim, because as will be observed it was provided by said section 4 (pursuant to which Jordan was granted his pension) that the pension to be paid thereunder to a disabled fireman ceased at his death; and section 5 provided for the payment of a pension to the widow of a fireman only where he died as a result of injuries within a year from the date of such injuries. As stated in her briefs, her claim is founded upon the 1925 and 1929

amendments to said sections 4 and 5, and is based upon the theory that her right to a pension thereunder became vested in her at the time of the enactment of said amendments, and that being so vested, the right could not afterwards be taken away. It is well established, however, that pension rights do not vest at the time of the enactment of the law, but only upon the happening of the contingency or event upon which the right thereto accrues (Klench v. Board of Pension Fund Com'rs, 79 Cal. App. 171, 249 P. 46; O'Dea v. Cook, 176 Cal. 659, 169 P. 366), and that at any time before the happening of the contingency upon which the right to the pension vests the law granting such right is subject to alteration or repeal. Cohrn v. Henderson, 19 Cal.App. 89, 124 P. 1037; Pennie v. Reis, 80 Cal. 266, 22 P. 176; Pennie v. Reis, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426. Here Jordan's right to a pension vested in him in 1914 at the time of his injuries and retirement, and having vested in him at that time his right thereto could not have been subsequently taken away. O'Dea v. Cook, supra. Admittedly, however, petitioner's alleged pension rights did not come into being until the enactment of the 1925 and 1929 amendments, and under the rule of the Klench case, supra, could not become a vested right until the happening of the contingency or event upon which the right thereto accrued, to-wit, the death of her husband; and three years prior to the accrual of such right the 1925 and 1929 amendments under which she claimed such right were repealed by the adoption of the new charter, which, as shown, provides in effect that when a member of the department shall have been retired on a pension (as in the case of Jordan) on or after January 1, 1900, and prior to January 21, 1925, and shall have died, his widow to whom he was married "prior to the date of the injury" resulting in death shall be entitled to the pension provided for therein. Therefore, since petitioner was not married to Jordan prior to the date of the injuries which she claims resulted in his death, she is ineligible to the pension under said provision.

[4, 5] Petitioner seems to argue that the provisions of the 1925 and 1929 amendments should be given a retrospective effect so that the pension rights she claims thereunder shall become part of the pension right vested in Jordan in 1914 at the time of his retirement. As stated, however, in the case of O'Dea v. Cook, supra, a fundamental and universal rule in the construction of statutes is that they shall be given prospective and not retrospective effect, unless such latter effect is made compulsory by the language of the act itself. There is an absence of any such language in either of the amendments relied on by petitioner.

[6-8] It is also contended in substance that inasmuch as a pension is not deemed to be a bounty or a gratuity, but is upheld in law on the theory that pension provisions become a part of the contemplated compensation for services rendered under the pension statute, and so in a sense become a part of the contract of employment itself (O'Dea v. Cook, supra), that the additional pension rights claimed by petitioner under the 1925 and 1929 amendments constituted an increase in Jordan's compensation, and became a part of his contract of employment, which increase could not afterwards be taken away. It appears to be definitely settled, however, that a pensioner has no vested right to a specific sum as a pension, but that sum may be increased or decreased according to correspondent increases or decreases in the salary of the rank upon which the pension is based. Klench v. Board of Pension Fund Com'rs, supra; Murphy v. City of Piedmont, 17 Cal.App.2d 569, 62 P.2d 614, 64 P.2d 399; Casserly v. City of Oakland, 6 Cal.2d 64, 56 P.2d 237; Home v. Souden, 199 Cal. 508, 250 P. 162; Brooks v. Pension Board, 30 Cal.App.2d 118, 85 P.2d 956; Carr v. Fire Commission, 30 Cal.App.2d 208, 85 P. 2d 959; Jones v. Cooney, 82 Cal.App. 265, 255 P. 536. Therefore, if, as petitioner contends, the provisions of the 1925 and 1929 amendments shall be deemed to be an increase in the amount of the pension, the adoption of the new charter in 1932, three years before Jordan's death, operated under the circumstances here present to take the increase away.

[9-12] Another argument advanced is that if respondent's position is sustained it will bring about the result of denying a pension to the widow of one fireman of a certain rank, and the granting of a pension to the widow of another fireman of a like rank. In answer thereto it will suffice to say that no public officer is entitled as of right to a pension. Douglas v. Pension Board, etc., 75 Cal.App. 335, 242 P. 756. Eligibility thereto is regulated by statute (Klench v. Board of Pension Fund Com'rs, supra), and where, as here, such eligibili-

ty does not exist, it is beyond the judicial powers of the court in construing the statute to add thereto. Courts must take a statute as they find it, and if its operation results in inequality or hardship in some cases, the remedy therefor lies with the legislative authority. Bock v. City of Oakland, 19 Cal.App.2d 115, 64 P.2d 1098.

The remaining points urged by petitioner are merely incidental to those already discussed, and likewise are without merit. Therefore, since petitioner has failed to show that under the law she is entitled to a pension, the judgment must be affirmed, and it is so ordered.

We concur: PETERS, P. J.; WARD, J.

---

36 Cal.App.2d 31

PEOPLE v. WHITLOW.

Cr. 3269.

District Court of Appeal, Second District, Division 1, California.

Dec. 9, 1939.

1. Larceny 🔑52

Evidence sustained conviction of grand theft as against contention that money obtained by accused from prosecuting witness was a loan.

2. Criminal law 🔑371(2)

In prosecution for grand theft, where there was evidence that accused procured money from prosecuting witness under promise of marriage, attempt to introduce evidence that accused procured a certain sum of money from another woman, and that accused also resorted to marriage lure in his transaction with such other woman, was relevant to the issue of intent of accused at the time he obtained money from prosecuting witness.

3. Criminal law 🔑338(1)

Evidence of any fact from which the fact in issue is logically inferable is relevant.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

David L. Whitlow was convicted of grand theft, and he appeals.

Affirmed.

Vernon R. Hamilton, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant David L. Whitlow, who was adjudged guilty of the crime of grand theft by the court, a jury having been duly waived, appeals from the judgment of conviction, and from the order denying a motion for a new trial.

Appellant was charged with obtaining $300 from one Ethel McCarthy, on or about March 18, 1939.

Briefly, the evidence reveals that Miss McCarthy, a child nurse by occupation, was working in an employment agency in the early part of the year 1939; she became acquainted at that time with the defendant, who was seeking employment. After they had seen each other daily for about six weeks, they appear to have arrived at an understanding regarding the possibility of prospective marriage. In the early part of March, 1939, Miss McCarthy told the defendant that she was intending to go into an employment agency business, and they discussed the matter of the purchase by her of a one-half interest therein for the defendant, who was still unemployed. Whitlow, however, was interested in purchasing a one-half interest in a gasoline station located at Third street and Venice boulevard, in Los Angeles, owned by a Mr. C. F. Graham. They drove out one day to the gasoline station, and the defendant talked to Mr. Graham out of Miss McCarthy's hearing. Two or three days later, on Saturday afternoon, March 18th, Miss McCarthy gave the sum of $300, which she had borrowed from an individual, to Whitlow for the purpose of completing the purchase of his one-half interest in the filling station. Miss McCarthy did not see the defendant until the next day, Sunday, at which time he stated that he was investigating the service station deal further. On Tuesday morning, the defendant told her that he had lost the $300 in gambling on Saturday night, Sunday night and Monday night. Miss McCarthy saw the defendant on one occasion thereafter, at which time he promised to repay the money lost. Some two weeks later Miss McCarthy reported the matter to the district attorney's office.

At about the same time as the incident above related, namely, on March 22, 1939, the defendant obtained $225 from a Mrs. Ida E. Morse for the asserted purpose of purchasing an interest in a gasoline station, which money was also lost in gambling.

[1] It was claimed by defendant at the trial that the money was obtained from Miss McCarthy as a loan, for which reason it is contended on appeal that the evidence is insufficient to support the judgment. Primarily, it was the function of the trial judge to determine the truth of the defendant's testimony, in which connection, in all probability, it was no more impressive at the trial than the record reveals it to be on appeal. The evidence was sufficient to sustain the court's finding of guilt. All of the elements of the crime were fully established.

It is next contended that the testimony of Mrs. Morse, with regard to the $225 obtained from her, was irrelevant and hence that its admission was error. It is further urged that the district attorney's effort to establish, by the testimony of Mrs. Morse, that the defendant also resorted to the marriage lure in his transaction with her, amounted to prejudicial misconduct. In that connection the record reveals that the following took place:

Redirect examination by Mr. Blalock, deputy district attorney:

"Q. Mrs. Morse, did this defendant ever propose marriage to you?

"Mr. Hamilton (Defendant's attorney): Objected to as immaterial, if the Court please.

"A. We didn't talk things like that.

"Q. (By Mr. Blalock): Did the defendant ever propose marriage to you?

"Mr. Hamilton: Just a moment. May I have a ruling on my objection? I don't know why we should embarrass this witness or what the materiality of that question is.

"Mr. Blalock: Merely further corroboration of the modus operandi of this defendant in securing money from women.

"Mr. Hamilton: I cite the remarks of the district attorney as misconduct. It is an insinuation.

"Mr. Blalock: There is no insinuation. I expect to be able to establish that he proposed marriage to Mrs. Morse.

"Mr. Hamilton: She answered the question that they didn't talk about such things, and I don't think it is material or competent to any issues in this case.

"The Court: It is overruled.

"Q. By Mr. Blalock: Do you recall now, Mrs. Morse, whether this defendant ever proposed marriage to you? A. Not in any serious way at all.

"Q. Well, did he ever propose marriage to you?

"Mr. Hamilton: Just a moment. I object to that. The matter has been answered.

"A. I am not going to answer.

"The Court: Overruled.

"Mr. Blalock: The witness says she is not going to answer.

"The Court: All right.

"Q. By Mr. Blalock: As a matter of fact, didn't you say to him, 'Well, Bob, don't be silly. I am old enough to be your grandmother?'

"Mr. Hamilton: Just a moment. Now I am going to object to that as an attempt on the part of the district attorney to impeach his own witness.

"The Court: Objection sustained."

[2, 3] In the circumstances, such evidence was not inadmissible, either with regard to the fact of obtaining the money, or with reference to the evidence sought to be introduced regarding a proposed marriage. The intent in the mind of the defendant at the time he obtained the money from Miss McCarthy was a fact in issue. Evidence of any other facts from which the fact in issue is logically inferable, is relevant. Defendant's contention, therefore, that the effort to introduce such testimony amounted to prejudicial misconduct is without merit.

There being no errors in the record, the judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J., WHITE, J.

35 Cal.App.2d 685

STUB v. HARRISON.

Civ. 2360.

District Court of Appeal, Fourth District, California.

Dec. 4, 1939.

1. Appeal and error 🔑957(1)

Generally, reviewing courts are more inclined toward upholding orders vacating defaults upon proper showing than affirming orders denying such motions, even though upon the same showing made, reviewing court would have reached a conclusion opposed to that of trial court.

2. Appeal and error 🔑957(1)
Judgment 🔑139

A motion to set aside a default judgment is addressed to the sound discretion of the trial court and in absence of clear showing of abuse of discretion a reviewing court will not disturb the order of the court below. Code Civ.Proc. § 473.

3. Judgment 🔑143(3)

The statute providing for setting aside of a default judgment for excusable neglect is remedial and is to be liberally construed so as to dispose of cases upon their substantial merits and to give to the party claiming in good faith to have a subsisting cause of action or a substantial defense thereto an opportunity to present it. Code Civ.Proc. § 473.

4. Judgment 🔑143(10)

Under statute authorizing the setting aside of a default judgment by reason of "excusable neglect," default judgment may be set aside where default has been suffered by reason of the excusable neglect of the attorney. Code Civ.Proc. § 473.

[Ed. Note.—For other definitions of "Excusable Neglect," see Words & Phrases.]

5. Appeal and error 🔑935(2)

On appeal from an order setting aside a default judgment for excusable neglect, all presumptions will be indulged in favor of the correctness of the trial court's action. Code Civ.Proc. § 473.

6. Appeal and error 🔑948

On appeal from an order setting aside a default judgment for excusable neglect, burden is upon the appellant to make it appear that trial court abused its discretion. Code Civ.Proc. § 473.

7. Judgment 🔑143(12), 169

Where defendant's attorney in automobile accident case was called away from office due to serious injuries sustained by his son and during his absence legal matters requiring attorney's attention accumulated on his desk and by reason of such circumstances matter of preparing a pleading in the automobile injury case escaped attorney's attention and attorney as soon as he learned that default judgment was entered attempted to obtain an order setting aside the default, order setting aside default for "excusable neglect" and requiring defendant to pay the sum of $25 as a condition to setting aside the default was discretionary. Code Civ. Proc. § 473.

8. Appeal and error 🔑957(2)

District Court of Appeal will not interfere with discretion of trial court in setting aside a default on ground of mistake, inadvertence and excusable neglect so as to insure the trial upon the merits, but is disposed to give to respondent the most favorable possible construction of the evidence in support of the grounds alleged. Code Civ.Proc. § 473.

* * *

Appeal from Superior Court, San Diego County; Frank J. Macomber, Judge.

Action by I. A. Stub against M. E. Harrison for injuries sustained in an automobile collision. From an order setting aside a default and judgment by default on ground of mistake, inadvertence and excusable neglect, plaintiff appeals.

Affirmed.

John H. Bowlby, of San Diego, for appellant.

Wright, Monroe, Harden & Thomas, of San Diego, for respondent.

GRIFFIN, Justice.

This is an appeal from an order vacating a default and a default judgment. The action was brought by the plaintiff to recover damages alleged to have been sustained by him in an automobile collision. It was filed on April 12, 1939. Defendant M. E. Harrison was a resident of Los Angeles county and summons and complaint were served on him in that county on May 10, 1939. As is shown by the affidavits on file in this action, the defendant promptly delivered the papers to his insurance carrier in the city of Los Angeles, which by the terms of its insurance contract undertook the defense. On May 16, 1939, these papers were forwarded by the insurance carrier to counsel for respondent herein in San Diego, who regularly represents it, the papers being addressed to the attention of a particular member of the firm. They were received on May 17, 1939. The attorney promptly communicated with an insurance adjuster of San Diego who had charge of the investigation of the accident and on May 18, 1939, had a conference with him, at which time there were delivered to the attorney statements of witnesses and other matters setting forth the facts of the case.

The defendant, it is claimed, desired to file a cross-complaint but it developed that the files delivered to the attorney, although sufficient to enable him to prepare an answer, did not contain all of the information necessary for the drafting of the cross-complaint.

Inasmuch as he had until June 10, 1939, or thereabouts to file a pleading, the attorney communicated with the insurance carrier in Los Angeles requesting the additional information. As shown by the affidavits on file, on the evening of the 19th day of May, 1939, the attorney in charge of the case received information by telephone that his son had been seriously injured and was confined in a hospital at Palo Alto, California. The following morning, Saturday, May 20, 1939, the attorney left for Palo Alto and was at the bedside of his son until May 30th, when he returned to San Diego. As a result of his absence from the city, much legal work and other matters requiring his attention had accumulated on his desk and as a result he was busily engaged on every day thereafter in an attempt to catch up with his work and business by reason of the time lost on the trip to Palo Alto, and on several of the intervening days between that day and the 13th day of June, 1939, he was engaged in the trial of a case in the superior court of San Diego county. By reason of this situation and owing to the mental state of counsel over the seriousness of the injury to his boy, the matter of preparing the pleading in this case, it is claimed, entirely escaped his attention and it was not until on the evening of June 13, 1939, when clearing off his desk of accumulated pleadings and correspondence, that his attention was again called to the case. Immediately on the morning of June 14th the attorney prepared and caused to be served an answer, and it was not until this pleading was filed in the clerk's office that he discovered that a default had been taken.

Defendant's attorney, immediately on the same day prepared a notice of motion to vacate the default and affidavit in support of that motion, setting up the facts hereinbefore referred to. It developed that the default had been entered on June 10, 1939. After preparing the papers for setting aside the default, defendant's attorney learned that the attorney for the plaintiff would attempt on the same day to obtain a default judgment. On the afternoon of June 14, after the service not only of the answer but of the motion to set aside the default, the attorney for the plaintiff appeared in the superior court and applied for judgment. One of the defendant's attorneys appeared in open court and called attention to the fact that defendant had attempted to answer, and that there were already filed and pending an application and motion to set aside the default. Plaintiff and his attorney insisted, however, on proceeding, and the court, despite the pendency of the motion to vacate the default, and despite the protest of counsel for defendant in open court rendered judgment by default.

Thereupon, defendant, through his attorneys, served and filed the necessary motion and supporting papers to set aside both default and judgment. This motion came up for hearing in the superior court, before another judge thereof, on June 26, 1939, the same day named in the original notice of motion to set aside the default, and after argument of counsel the motion was granted. Because of the insistence of the plaintiff that he had gone to expense in procuring attendance of witnesses and taking the default judgment, the court ordered and required defendant to pay to plaintiff the sum of $25 as a condition to setting aside the default.

The order setting aside the default and judgment was signed and entered on June 29, 1939. Thereafter, pursuant to the court's requirement, counsel for defendant on June 30, 1939, issued and delivered to the attorney for plaintiff their check for $25, which was cashed and the proceeds retained by him. From this order setting aside the default and default judgment plaintiff has appealed.

It is the position assumed by the defendant and respondent that the situation involved amply justified the trial court in exercising its discretion to grant relief to him, and that the order of the trial court should be affirmed, citing Melde v. Reynolds, 129 Cal. 308, 61 P. 932; Lynch v. De Boom, 26 Cal.App. 311, 146 P. 908; Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204; Brill v. Fox, 211 Cal. 739, 297 P. 25; Weck v. Sucher, 96 Cal.App. 422, 274 P. 579; Strosnider v. Superior Court, 17 Cal.App.2d 647, 62 P.2d 1394; Bodin v. Webb, 17 Cal.App.2d 422, 62 P.2d 155; Kalson v. Percival, 217 Cal. 568, 20 P.2d 330; Jones v. Title Guaranty & Trust Co., 178 Cal. 375, 173 P. 586; County of Los Angeles v. Lewis, 179 Cal. 398, 177 P. 154; Dunn v. Standard Acc. Ins. Co., 114 Cal. App. 208, 299 P. 575; Dwyer v. Davis, 120 Cal.App. 435, 8 P.2d 168; Nicoll v. Weldon, 130 Cal. 666, 63 P. 63; Berri v. Rogero, 168 Cal. 736, 145 P. 95; O'Brien v. Leach, 139 Cal. 220, 72 P. 1004, 96 Am.St.Rep. 105; Downing v. Klondike M. & M. Co., 165 Cal. 786, 134 P. 970; Farrar v. Steenbergh, 173 Cal. 94, 159 P. 707; Carbondale Machine Co. v. Eyraud, 94 Cal.App. 356, 271 P. 349; Burns v. Scooffy, 98 Cal. 271, 33 P. 86.

Appellant maintains that the facts set forth in support of the respondent's motion to vacate the default judgment do not show any legal surprise, inadvertence or excusable neglect, but do definitely show gross and inexcusable neglect, citing Smith v. Tunstead, 56 Cal. 175; Romero v. Snyder, 167 Cal. 216, 138 P. 1002; Redding Gold & Copper Min. Co. v. Nat. Surety Co., 18 Cal. App. 488, 123 P. 544; O'Brien v. Leach, supra; Ross v. San Diego Glazed Cement Pipe Co., 50 Cal.App. 170, 194 P. 1059; Durbrow v. Chesley, 24 Cal.App. 416, 141 P. 631; Slater v. Selover, 25 Cal.App. 525, 144 P. 298; Bailey v. Taaffe, 29 Cal. 422, 423; Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863; People v. O'Connell, 23 Cal. 281, 282; Gill v. Peppin, 41 Cal.App. 487, 182 P. 815; Victor Power & Mining Co. v. Cole, 11 Cal.App. 497, 105 P. 758.

[1] We have read and examined the many authorities cited by both appellant and respondent. The appellate courts generally are more inclined toward upholding orders vacating defaults, upon proper showing, than affirming orders denying such motions. This seems to be the general rule even though upon the same showing made the appellate court would have reached a conclusion opposed to that of the trial court. Such conclusion would not necessarily be indicative of an abuse of discretion on the part of the trial court. This may explain many of the cases cited which would otherwise seem to be a conflict in the decisions. Dwyer v. Davis, supra; Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148; O'Brien v. Leach, supra.

[2, 3] A motion to set aside a default judgment is addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the order of the court below. Section 473 of the Code of Civil Procedure is a remedial provision and is to be liberally construed so as to dispose of cases upon their substantial merits and to give to the party claiming in good faith to have a subsisting cause of action or a substantial defense thereto an opportunity to present it. The courts, therefore, are somewhat loath to penalize a litigant on account of some omission on the part of his attorney, particularly where the litigant himself has acted promptly and has relied, as in the instant case, upon the attorney to protect his rights.

[4-6] It has therefore been frequently held that default judgments may be set aside under section 473 of the Code of Civil Procedure where the default has been suffered by reason of the excusable neglect of the attorney. On appeal from an order granting relief under section 473 of the Code of Civil Procedure all presumptions will be indulged in favor of the correctness of the trial court's action and the burden in all cases is upon the appellant to make it appear that the court's discretion was abused in making the order. Callaway v. Wolcott, 90 Cal.App. 753, 266 P. 574. In the instant case, while the showing made in support of the motion is not in all respects of the strongest character, it cannot be said that it is not possessed of considerable merit.

[7, 8] The defendant himself was diligent and moved promptly. He relied upon his counsel. The seriousness of counsel's mental state, due to the anxiety over the injury to his son, was better known to the trial court than to this court. An incident of this nature may have more effect on some people than others. The trial court, exercising its sound discretion, has held that the neglect of the attorney was excusable. Counsel acted promptly after discovery of the inadvertence. While a motion to set aside the default was pending, appellant, over respondent's objection, insisted upon the entry of the default judgment. Counsel

who was guilty of neglect was properly penalized. Appellant has appealed from the conditional order setting aside the default and has also accepted and retained the penalty imposed. This court is not disposed to interfere with the discretion of the trial court in setting aside the default and judgment by default on the ground of mistake, inadvertence and excusable neglect so as to insure the trial upon the merits, but is disposed to give to the respondent the most favorable possible construction of the evidence in support of the grounds alleged.

The order is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

---

35 Cal.App.2d 728

PEOPLE v. BLACKWOOD et al.

Cr. 1685.

District Court of Appeal, Third District, California.

Dec. 6, 1939.

1. Homicide 🔑**244(1)**

Evidence sustained conviction of one defendant for first degree murder as against claim of self-defense.

2. Homicide 🔑**22(2)**

Evidence that defendants had quarreled with one of the victims over use of an outdoor privy building and that on day of killings codefendant approached the building in a violent rage with gun in hand and commenced shooting immediately after having disarmed one of the victims by suggesting a truce warranted inference that codefendant harbored an intent to kill, and hence offense was "murder" rather than "manslaughter," as respects codefendant, even if intent was formed by codefendant after armed victim threw away his revolver. Pen.Code, §§ 192, 1181, subd. 6.

[Ed. Note.—For other definitions of "Manslaughter" and "Murder," see Words & Phrases.]

3. Homicide 🔑**30(1)**

In prosecution of a husband and wife for murder, evidence justifying belief that when defendants left their trailer wife either knew that her husband intended to commit a homicide or that such might be the natural consequences of his acts, and that she did not try to deter him, but aided him, warranted finding that, with guilty knowledge, the wife encouraged the husband in commission of crime, and hence wife was equally guilty as a principal. Pen.Code, § 31, 192, 1181, subd. 6.

4. Criminal law 🔑**80**

Where a principal in the first degree and a principal in the second degree have separate trials, the judgment against one has no bearing upon judgment against the other.

5. Criminal law 🔑**80**

A principal in the second degree may be convicted even though the one who committed the crime has been acquitted in another trial.

6. Criminal law 🔑**80**

Where evidence against two principals tried jointly for murder was not necessarily precisely the same, and a jury would have been justified in finding the principals guilty of different degrees of crime, the trial court could properly reduce the judgments, against one principal without reducing them against the other principal. Pen.Code, §§ 192, 1181, subd. 6.

7. Homicide 🔑**343**

Error, if any, in reducing judgments against codefendant in murder prosecution from murder in the second degree to manslaughter was not ground for reversing such judgments on codefendant's appeal, since error was in codefendant's favor. Pen.Code, §§ 192, 1181, subd. 6.

8. Criminal law 🔑**993**

Where codefendant in murder prosecution was found guilty of murder in the second degree, an order of the trial court reducing the judgment against codefendant to manslaughter had the effect of putting the record in condition that it would have been in if jury had found codefendant guilty of manslaughter in the first place and trial court had entered judgment accordingly.

9. Homicide 🔑**342**

Where the evidence shows defendant to be guilty of murder but jury is instructed as to manslaughter and brings in a verdict of guilty of manslaughter, the judgment will stand.

10. Homicide ⚿343

Where codefendant in murder prosecution had been found guilty of murder in the second degree and trial court modified judgments against codefendant by reducing them to manslaughter, on appeal, codefendant could not complain that trial judge had entered judgments against her that were milder than the ones which would have been imposed if trial judge had accepted verdicts of jury. Pen.Code, §§ 192, 1181, subd. 6.

◆

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Irl R. Blackwood was found guilty of murder in the first degree under the first count in an information charging murder, and Irene Blackwood was found guilty of murder in the second degree on the same count, and on a second count both were found guilty of murder in the second degree, and, after both judgments against Irene Blackwood were reduced to manslaughter, Irl R. Blackwood and Irene Blackwood appeal.

Judgments affirmed.

William J. Cassettari, of Grass Valley, and George E. Foote, of Sacramento, for appellants.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

DEIRUP, Justice pro tem.

Irl R. Blackwood and Irene Blackwood, defendants and appellants, are husband and wife. Each was charged under two counts of an information with the murder of James Roots and Arthur Lavalley. On the first count Irl Blackwood was found guilty of murder in the first degree with recommendation of life imprisonment, and on the same count his wife was found guilty of murder in the second degree. As to the second count both were found guilty of murder in the second degree. They had entered pleas of not guilty and also not guilty by reason of insanity but the latter pleas were withdrawn after a partial trial following the trial upon the pleas of not guilty. The trial court denied a new trial but modified both of the judgments against Irene Blackwood by reducing them to manslaughter.

The homicides were committed on January 1, 1939, at about four o'clock in the afternoon. James Roots had lived with his wife and children for some months in a tent house or cabin in a grove of trees near the city of Grass Valley. On this New Year's Day there was a party at the cabin. About seventeen persons were there, including men, women and children, some in the cabin, others outside. Lavalley was one of the guests. Shortly before the killing he and a guest named Maule went to a privy which was about 50 feet from the cabin. Finding it locked, Lavalley pulled off the lock and stepped inside.

The Blackwoods lived in a trailer house approximately 100 feet from the Roots cabin and 150 feet from the privy, which Blackwood had built. A trail from their home to the privy passed close to the Roots cabin. The two families had had trouble over the use of the privy. The Blackwoods objected to the use of it by strangers; hence the lock. At one time the Roots boys had fastened a chain to the privy and had rattled it while Mrs. Blackwood was inside and this had enraged her. On the day of the homicides, at about noon, a woman who was visiting at the Roots cabin had annoyed her again by putting her foot against the privy, as if to push it over. These are sordid details, of course, but it is necessary to set them out in order to appreciate the states of mind of the appellants.

Immediately after Lavalley pulled the lock off the privy door the Blackwoods came down from their cabin, half walking, half running, Blackwood with a small pistol in his hand, Mrs. Blackwood drawing one from the pocket of her sweater. Blackwood shouted at the two men to "get the hell out of there" and demanded of Lavalley why he had pulled off the lock. Lavalley and Maule, with their hands in the air, tried to explain that they did not know that it was a private toilet. A crowd of guests gathered and tried to appease the Blackwoods, who waved them back with their pistols.

James Roots was in his cabin when the trouble began. One of the children came in and told him about it and he and his wife and her sister stepped outside. Seeing the Blackwoods with guns in their hands Roots went back into the cabin and returned with a long-barreled revolver, remarking that he did not intend to use it but was going to bluff the Blackwoods. They retreated about 20 feet as he walked toward them. Then Blackwood suggested that they all throw down their guns and settle the matter peaceably. Roots immediately threw his pistol 20 or 25 feet away and put up his hands. According to some of the witnesses, Blackwood smiled and fired a shot which flared the hair of Lavalley's daughter, a little girl. She screamed, and Lavalley put his arm around her to reassure her. Mrs. Roots picked up her husband's pistol but was immediately disarmed by one of the guests, who testified that while he was holding her arm the pistol went off. At about the same moment Blackwood shot Roots twice in the chest and Lavalley three times in the abdomen. Lavalley grappled with him and other persons disarmed him. Roots was killed instantly; Lavalley died in a short while.

There was testimony to the effect that Mrs. Blackwood's pistol was jerking as if she was pulling the trigger, but she did not fire any shots. Immediately after the shooting began one of the women seized her by the hair and pulled her down and others disarmed her.

The Blackwoods returned to their cabin after the affray and when an officer arrived to arrest them they gave themselves up after a brief delay. The officer made a memorandum of what occurred at the time. Testifying from his notes, he said that Blackwood resented being handcuffed and remarked "that he was at one time paid for killing men, and now he was arrested for it". He is a veteran of the world war.

[1] Many witnesses were called on behalf of the state and their testimony, though varying in details, bears out the foregoing account of what happened. The stories told by the defendants are entirely different. They admitted that Blackwood fired the shots, but claimed that he did so in self-defense. The jury believed the state's witnesses.

[2] Counsel for appellants claim that the evidence shows that the killing was done "upon a sudden quarrel or heat of passion" and that this court should therefore reduce the judgments against Blackwood to manslaughter. Pen. Code, §§ 192, 1181, subd. 6. However, there is ample evidence from which the jury could have inferred that Blackwood harbored an intent to kill when he first approached Lavalley and Maule, for he came down from his house in a violent rage, with a gun in his hand, and he commenced shooting immediately after he had disarmed Roots by his suggestion of a truce. The remark he made to the officer about having been paid to kill men also indicated a disregard for human life. But even if the intent to kill was formed after Roots threw away his revolver, the facts nevertheless indicate that it was murder, not manslaughter, that was committed. Roots had accepted an offer of peace; Blackwood was no longer in danger. As has been said very often, "The act of killing may follow the intent to kill as rapidly as follow the successive thoughts of the mind." People v. French, 12 Cal.2d 720, 745, 87 P.2d 1014, 1027. Usually the intent to kill precedes the act by an appreciable period of time, but we have in the present case an illustration of the rule. Blackwood knew that he was in no danger, but in his terrible rage he formed the intent to kill and immediately acted upon that intent, even conceding that he did not harbor the intent when he left his cabin. The judgment should not be modified as to him.

[3] With respect to the defendant Irene Blackwood, counsel urge that the judgment should be reversed upon the ground that she was not guilty of any crime. He claims that there was no evidence of a conspiracy between her and her husband. This is not, however, a case of conspiracy, but of aiding and abetting. "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission * * * are principals in any crime so committed." Pen. Code, § 31. There was sufficient evidence before the jury to justify it in believing that when the defendants left their trailer house Mrs. Blackwood either knew that her husband intended to commit a homicide, or that such might well be the reasonable and natural consequences of his acts. She did not try to deter him; on the contrary, she aided and encouraged him by drawing a gun from her pocket. She was in a violent rage, too. It is more than likely that he would not have fired the fatal shots at all but for the assurance that he derived from the fact that she was ready to defend him with a gun. The jury was warranted in finding that, with guilty knowledge, she encouraged him in the commission of the crime. She was therefore equally guilty as a principal. People v. Bond, 13 Cal.App. 175, 109 P. 150; People v. Marty, 59 Cal.App. 503, 210 P. 964; People v. Bowers, 56 Cal.App. 80, 204 P. 548.

Counsel for appellants argue that the effect of the reduction of the judgments against Mrs. Blackwood by the trial court from murder in the second degree to manslaughter is to acquit her. Their contention is that if she is not guilty of murder in the second degree, as being equally guilty with her husband as an aider and abettor, she cannot be held for manslaughter, since she did not commit a homicide herself and that is not the crime for which judgment was entered against her husband.

[4,5] Our attention has not been called to any case in which the principal in the first degree (as the one who actually commits the act is often called) and the principal in the second degree (being the aider and abetter) have been found guilty of different degrees of crime where they have been tried jointly. It is settled that if they have separate trials the judgment against one has no bearing upon the judgment against the other, for the reason that the evidence in the two cases may not be the same. The principal in the second degree may be convicted even though the one who committed the act has been acquitted in another trial. People v. Bearss, 10 Cal. 68; People v. Newberry, 20 Cal. 439; Christie v. Commonwealth, 193 Ky. 799, 237 S.W. 660, 24 A.L.R. 599 and note.

[6,7] We do not believe that the rule that the two principals are equally guilty is so inflexible that a jury might not find them guilty of different degrees of crime even though they are tried jointly. For the evidence against them is not necessarily precisely the same. The firing of the shots by Blackwood warranted an inference of the malice which is essential to the crime of murder, while Mrs. Blackwood might not be chargeable with guilty knowledge of that malice, but might nevertheless be guilty of aiding and abetting him in the commission of voluntary manslaughter "upon a sudden quarrel or heat of passion". Pen. Code, sec. 192. For this reason a jury might be justified, in such a case as this, in finding the two principals guilty of different degrees of crime, and the trial court might properly, as in this case, reduce one of the judgments and not the other. But in any view of the case the judgments cannot be reversed. If the trial court committed an error, the mistake was in favor of Mrs. Blackwood, and does not furnish grounds for a reversal upon her appeal.

[8,9] The effect of the order of the trial court reducing the judgment against Mrs. Blackwood to manslaughter was to put the record in the condition that it would have been in if the jury had found her guilty of manslaughter in the first place and the court had entered judgment accordingly. It is clear from the authorities that if the jury had rendered such a verdict Mrs. Blackwood would not be heard to complain, even though the verdict was for a degree of crime less than the one of which she was guilty. These authorities are to the effect that where the evidence shows the defendant to be guilty of murder but the jury is instructed as to manslaughter and brings in a verdict of guilty of manslaughter, the judgment will stand. People v. Hamilton, 49 Cal.App. 30, 192 P. 467; People v. Borrego, 7 Cal.App. 613, 95 P. 381; People v. Tugwell, 32 Cal.App. 520, 163 P. 508; People v. Wolcott, 137 Cal. App. 355, 30 P.2d 601, 604. In the last case cited it is said: "The jury in possession of all of the testimony found that the death was caused by appellant. If the testimony in the circumstances of this case supports that implied finding, it would support the finding of murder. * * * If the suggestion of manslaughter gave the jury the idea that possibly there were some mitigating circumstances in the killing, and in their private deliberations they concluded that appellant did the killing but that they would acquit him of murder and convict him of manslaughter, a crime included within the crime of murder (People v. Muhlner, 115 Cal. [303] 304, 47 P. 128), appellant has been the beneficiary of such suggestion. Without it, it may be assumed that the jury would have convicted him of murder. People v. Tugwell, supra. This being true, he cannot be heard to object."

[10] The logic of these authorities is applicable to the situation now before this court. Mrs. Blackwood cannot be heard to complain because the judge of the trial court entered judgments against her that were milder than the ones which would have been imposed if he had accepted the verdicts of the jury.

The judgments and the orders are affirmed.

We concur: THOMPSON, Acting P. J.; TUTTLE, J.

PEOPLE v. SNYDER.*

Cr. 3191.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1939.

Hearing Granted Jan. 11, 1940.

1. Criminal law ⚷1144(13)

On defendant's appeal from conviction after trial before jury in criminal prosecution, evidence was viewed most favorable to the People.

2. Homicide ⚷86

A specific intent to kill is an essential element in the crime of attempted murder.

3. Homicide ⚷145

In prosecution for attempted murder, prosecution must allege and prove as a fact specific intent to kill, and such specific intent cannot be predicated upon a presumption.

4. Homicide ⚷145

Where specific intent to kill is an element of the offense charged, the existence of such intent must be established as a fact by evidence that will warrant conclusion to that effect by jury, and the specific intent cannot be presumed from commission of unlawful act, though jury may infer it from acts and conduct of defendant.

5. Criminal law ⚷778(6)

Where defendant was convicted of attempted murder, instructions that a person must be presumed to intend to do that which he voluntarily and wilfully does and to intend all natural, probable, and usual consequences of his own acts, were erroneous, where trial court instructed that instructions were to be considered as applicable to each count in indictment, and did not limit erroneous instructions to counts other than those charging attempted murder.

6. Criminal law ⚷778(6)

Where defendant was convicted of attempted murder, instructions that a person must be presumed to intend to do that which he voluntarily and willfully does, and to intend all natural, probable, and usual consequences of his own acts, could not be held applicable to a lesser and included offense, where there was no lesser offense necessarily included in greater offense of which defendant was found guilty.

7. Criminal law ⚷1186(4)

Where defendant was convicted of attempted murder, erroneous instructions that a person must be presumed to intend to do that which he voluntarily and wilfully does and to intend all natural, probable, and usual consequences of his own acts, required a reversal as resulting in a miscarriage of justice. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Martin M. Snyder was convicted of attempted murder, and he appeals.

Reversed, and new trial ordered.

Jerry Giesler, of Los Angeles, and Ward Sullivan, of San Francisco, for appellant.

Earl Warren, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Ugene U. Blalock, Deputy Dist. Atty., both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment of guilty of attempted murder and from an order denying his motion for a new trial after trial before a jury, defendant appeals.

[1] Viewing the evidence most favorable to the People (respondent), the essential facts are:

October 15, 1938, defendant, while sitting in the music room of the home of Myrl Alderman in company with Myrl Alderman, Ruth Etting, and Edith Snyder, after a brief discussion suddenly fired two shots in the direction of Myrl Alderman from a .32 caliber revolver, which he held in his hand, one of the shots striking Mr. Alderman. Further discussion of the evidence is unnecessary, since there is no attack upon the sufficiency of the evidence to sustain the verdict of guilty.

Defendant relies for reversal of the judgment on this proposition:

The trial court committed prejudicial error in instructing the jury as follows:

A. "The Court further instructs the jury that the intent or intention with which an act is done is manifest by the circumstances connected with the offense and the sound mind and discretion of the accused."

B. "A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts."

---

*For subsequent opinion see 104 P.2d 639.

C. "The Court further instructs the jury that the words 'Malice' and 'Maliciously' import a wish to vex, annoy or injure another person, or an intent to do a wrongful act established either by proof or by presumption of law."

[2, 3] This proposition is tenable. Defendant was charged with attempted murder. A specific intent to kill is an essential element in the crime of attempted murder. People v. Miller, 2 Cal.2d 527, 533, 42 P.2d 308, 98 A.L.R. 913. It is necessary for the prosecution to allege and prove as a fact this specific intent, and such specific intent may not be predicated upon a presumption. People v. Miller, supra.

[4] Mr. Presiding Justice Conrey, in People v. Ramirez, 64 Cal.App. 358, 360, 221 P. 960, 961, thus accurately states the rule:

"The court instructed the jury that—'A person must be presumed to intend to do that which he voluntarily and willfully does in fact do and must also be presumed to intend all of the natural, probable, and usual consequences of his own acts.' Appellant contends that this instruction violates the rule that where specific intent is an essential element of the crime, the fact of such intent must be proved. There is no doubt that the rule is correctly stated. Where the specific intent to kill and murder is an element of the offense charged, it is necessary that the existence of that intent be established as a fact by such evidence as will warrant the conclusion to that effect by the jury. It is not to be presumed from the commission of the unlawful act, though the jury may infer it from the acts and conduct of the defendant. This is true wherever the crime falls short of homicide, even if it be the crime of assault with intent to commit murder."

Again in People v. Jones, 160 Cal. 358, 369, 117 P. 176, 181, Mr. Justice Henshaw, speaking for our Supreme Court, said:

"The court instructed the jury as follows: 'You are instructed that in determining the intention of the defendant at the time of the transaction complained of it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity. A person is presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all of the natural, probable, and usual consequences of his own acts. Therefore, if you are satisfied to a moral certainty, and beyond a reasonable doubt, that the defendant did assail, on the date mentioned, one George King, violently with a dangerous weapon, likely to kill, and which did in fact destroy the life of said George King, the natural presumption is that such assailant intended death or great bodily harm, and in the absence of evidence to the contrary this presumption must prevail.' It is contended that this instruction does violence to the law, in that the law is that whenever a specific intent is an element of an offense no presumption of law can arise, and that the specific intent is a fact to be shown like any other fact in the case. People v. Landman, 103 Cal. [577], 580, 37 P. 518; People v. Johnson, 106 Cal. [289], 295, 39 P. 622; People v. Flannelly, 128 Cal. [83] 89, 60 P. 670. The rule of law is as appellant declares in all crimes saving that of murder."

In People v. Brown, 27 Cal.App.2d 612, 613, 81 P.2d 463, 464, the court says:

"On this appeal defendant contends that the court erred in giving certain instructions requested by the prosecution, and that by reason thereof the jury was misled to the prejudice of the defendant. Under the charge of assault with a deadly weapon with intent to commit murder, it is incumbent upon the prosecution to prove a specific intent to commit murder, and being an essential ingredient of the crime, the intent cannot be inferred or presumed from the commission of an unlawful act. People v. Landman, 103 Cal. 577, 37 P. 518; People v. Johnson, 106 Cal. 289, 39 P. 622; People v. Maciel, 71 Cal.App. 213, 234 P. 877.

"On examining the instructions given it is apparent the jury were charged in effect while proof of intent to commit murder must be proved, proof of the commission of the unlawful act of discharging the rifle and shooting the complaining witness was presumptive proof that the defendant intended to commit murder; also that if it were established that the defendant shot Estep, that constituted proof that he intended to kill him.

"Among the instructions given was the following:

"'I instruct you that if you are convinced to a moral certainty and beyond a reasonable doubt that the defendant Elmer Brown intended to do an unlawful act and did wilfully do an unlawful act he is thereby presumed to have intended all the natural, probable and usual consequences of this act, unless there is evidence to controvert this presumption.'

"Also in the following instruction the court, in effect, told the jury the burden was on the defendant to prove lack of intent:

"'If you are convinced to a moral certainty and beyond a reasonable doubt that the defendant intended to do an unlawful act and did wilfully do it, he is presumed to have intended all the natural and probable consequences of the act unless he controverts this presumption by evidence on his own part.'

"In this instruction the jury were not only advised that a presumption of law that he intended to kill arose from the shooting, but the jury were also advised that he must controvert this presumption. This is incorrect. There is no burden placed upon the defendant to prove lack of intent. The burden is upon the prosecution to prove the intent.

"In the case of People v. Maciel, supra, the defendant was charged with assault with a deadly weapon with intent to commit murder. The court there gave the following instruction * * *:

"'In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence, but when the act committed by the accused is of itself an unlawful act, the law, in the first instance, presumes the criminal intent, and the burden of proof falls upon the defendant to show the absence of criminal intent.'

"It was contended upon the part of the defendant therein that this instruction violated the rule that whenever a specific intent was an essential ingredient no presumption of law arose as to the existence of such intent, for it was a fact to be proved like any other fact in the case. The court considering this, said while the first portion of the instruction was in the language of section 20 of the Penal Code, the latter portion was erroneous and prejudicial. The court stated that the jury were charged that when the act committed by the accused was unlawful, the law raised the disputable presumption that the act was intended, and that the person doing it, if done voluntarily, also intended the ordinary consequences of the act. This the court held was an instruction stating a rule of evidence, citing People v. Abbott, 2 Cal. Unrep. 383, 387, 4 P. 769. The court also held that had the court worded its instruction as contemplated in section 1963 of the Code of Civil Procedure it would have been proper, but the vice in the instruction as given lay in the fact that it went beyond the rule that an accused who had done an unlawful act was presumed to intend to have done that act, and asserted that when the act committed by the accused was unlawful, the law presumed the criminal intent without telling the jury what the criminal intent was which the law presumed. The court held that the words 'criminal intent' were broad enough to include any and every unlawful intent which was embraced within the crime charged against the appellant. 'It is only when the intent is not made an affirmative element of the crime that the law presumes that the act, if knowingly done, was done with a criminal intent. * * * When a specific intent is an element of the offense it presents a question of fact which must be proved like any other fact in the case. * * * "Where one is charged with assault with intent to commit murder, and it is proved that he fired a loaded pistol at another, there is no presumption of law that he intended to murder the person thus fired at."' People v. Maciel, supra.

"The court there held also that the vice of the foregoing instruction was not cured by another instruction to the effect that the defendant could not be convicted of the crime of assault with a deadly weapon with an intent to commit murder unless the jury believed beyond a reasonable doubt that the assault was committed with intent to commit murder."

In People v. Maciel, 71 Cal.App. 213, 234 P. 877, a case involving a conviction of the crime of assault with a deadly weapon with intent to commit murder, 71 Cal.App. at page 217, 234 P. at page 879, the court says:

"We come now to a more serious objection, and one which we are constrained to hold necessitates a reversal of the judgment. The court gave this instruction: 'In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence, but when the act committed by the accused is of itself an unlawful act, the law, in the first instance, presumes the criminal intent, and the burden of proof falls upon the defendant to show the absence of criminal intent.' * * * It is contended, and we think rightly so, that this instruction violates the rule that, whenever a specific intent is an essential ingredient of the offense, no presumption of law can arise as to the existence of such intent, for it is a fact to be proved like any other fact in the case.

"The first part of the instruction is based on and is in the language of section 20 of the Penal Code. But the last part is erroneous, and we think it was also prejudicial."

[5] In the present case the instructions given by the trial court and hereinbefore set forth were substantially the same as the instructions given in the cases above mentioned, which were held to be erroneous. There can be no question that the instructions in the present case were made applicable to the count upon which defendant has been convicted, in view of the fact that the trial court, among others, read to the jury this instruction:

"All of the instructions as given to you by the court are to be considered as applying to each of the counts set forth in the indictment unless I shall limit your consideration of any particular instruction to any particular count, in which event it will be your duty to consider such instruction only as respects such particular count referred to."

The erroneous instruction was not limited by the court to the counts other than those charging attempted murder. Furthermore, the court refused to give an instruction requested by appellant, in which it was unequivocally set forth that the fact that defendant fired the loaded gun at Alderman's "creates no presumption of law that defendant intended to murder the person fired at".

[6] Since there was no lesser offense necessarily included in the greater offense of which defendant was found guilty, the questioned instructions cannot by this court be held applicable to a lesser and included offense.

[7] Nor can the erroneous instructions be held to have been not prejudicial to the rights of the defendant under the provisions of article VI, section 4½ of the Constitution of the state of California. Discussing an analogous point, this court in People v. Maciel, supra, 71 Cal.App., at page 219, 234 P. at page 880, says:

"The erroneous instruction is beyond the reach of the saving grace of section 4½ of article 6 of the Constitution. It would have been otherwise had appellant been convicted of the lesser offense of assault with a deadly weapon. But he was convicted of the greater offense. To constitute the offense of which he was found guilty, the circumstances must be such as to authorize the jury, not the court, to infer the existence of the specific intent to murder."

Again in People v. Brown, supra, in referring to the giving of erroneous instructions similar to those involved in the instant case, the court said, 27 Cal.App.2d at page 616, 81 P.2d at page 465:

"It was also held in the Maciel Case, supra, that such an erroneous instruction was beyond the reach of the saving clause of section 4½ of article 6 of the Constitution."

For the foregoing reasons the judgment and order appealed from are and each is reversed and a new trial is ordered.

We concur: MOORE, P. J.; WOOD, J.

---

36 Cal.App.2d 59

PEOPLE v. GRIFFIN.

Cr. 3242.

District Court of Appeal, Second District, Division 2, California.

Dec. 11, 1939.

Hearing Denied Jan. 8, 1940.

1. Robbery 🔑24(1)

Evidence, that defendant obtained a sum of money by stating to saleslady of candy store that it was a holdup and demanding that she hand him money from cash register, sustained conviction of defendant for robbery in the second degree. Pen.Code, § 211.

2. Criminal law 🔑814(1)

Court properly refused to give an instruction on larceny where only crime shown

to have been committed was that of robbery. Pen.Code, § 211.

3. Criminal law ⟹404(4), 1036(1)

In robbery prosecution where information charged that defendant was armed at time of his arrest, admitting in evidence a revolver which was concealed on person of defendant at time of his arrest was not error, especially where defendant failed to object to its admission. Pen.Code, §§ 211, 969c; § 1168, subd. 2.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Russell L. Griffin was convicted of robbery in the second degree and of being armed at time of his arrest, and he appeals.

Judgment and order affirmed.

Vernon R. Hamilton, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged by information with the crime of robbery. It was also charged that he was armed at the time of his arrest and that he had suffered two prior felony convictions. Defendant admitted the two prior convictions, and a jury returned a verdict finding him guilty of robbery in the second degree and that he was armed at the time of his arrest. He appeals from the judgment and from the order denying his motion for a new trial.

It is now argued that the evidence is insufficient to justify the conviction. From the evidence presented by the prosecution it appears that defendant in the afternoon of January 27, 1939, entered a candy store at 3349 Wilshire boulevard in the city of Los Angeles and demanded of Miss Mary Leizer, a saleslady, that she hand to him money from the cash register, saying, "Keep your mouth shut, this is a hold up." She handed to him the sum of $3.95, consisting of approximately 48 pennies and many nickels and dimes. An elderly couple entered the store at this time and defendant rushed out and disappeared. Miss Leizer identified defendant as the perpetrator of the crime.

Mrs. Marion Canter was at the time of the robbery seated in her automobile, which was parked near the candy store. She noticed a man walking across the street from the vicinity of the store to a coupe parked directly in front of her car. This man maneuvered the coupe back and forth and struck the bumper of Mrs. Canter's car. He then drove his car away. Because of the manner in which her car had been bumped Mrs. Canter made a notation on a piece of paper of the license number of the car, 3B 6626 (1938). She soon learned that the candy store had been robbed, and furnished the police with the license number which she had written down.

While walking his beat at 3:15 a. m. on January 29, 1939, officer Leach noticed a coupe bearing license number 3B 6626 (1938) crossing Broadway on 4th street. He commandeered a car, gave chase and overtook the coupe at the corner of 5th and Hill streets. Defendant was taken from the coupe and to the police station, where an automatic revolver and approximately fourteen nickels were found on his person. He had no other money with him, but the officers on searching his clothing in his hotel room found approximately forty pennies tied up in a handkerchief. His coupe carried two sets of license plates.

[1] There is no occasion for setting forth other incriminatory evidence presented by the prosecution. Manifestly, there is no merit in defendant's contention that the evidence is insufficient to justify the conviction.

[2] Defendant contends that the trial court erred in failing to give to the jury his proffered instructions on the subject of larceny, arguing that larceny is included in the crime of robbery and that the jury might have found defendant guilty of larceny instead of robbery. In a proper case such an instruction should be given, but in the case before us it could not be reasonably expected that the jury would return a verdict of larceny on the evidence introduced. Defendant's defense was that he was not the party who committed the crime. No effort was made to show that the offense committed was larceny rather than robbery. The evidence of the prosecution as to the circumstances of the commission of the crime stands uncontradicted. Robbery is the felonious taking of personal property from another "against his will, accomplished by means of force or fear". Pen.Code, § 211. There can be no question but that Miss Leizer turned over the money

to defendant against her will and because of fear caused by defendant. In his brief defendant refers to her as "a frightened and hysterical young woman". She testified that she was afraid that he might do her violence. Although her first statement as to whether she knew that defendant had a gun at the time of the robbery was stricken, she later testified that "maybe he was just making motions as though he had it in his pocket". She then gave him money. It is apparent that she was fearful that he had a weapon in his pocket. Since the only crime shown to have been committed was that of robbery, defendant was not prejudiced by the failure of the court to instruct on the subject of larceny.

[3] Defendant also argues that the court erred in admitting in evidence the revolver which was concealed upon the person of defendant at the time of his arrest. The revolver was introduced in evidence without objection. Under the provisions of sections 969c and 1168, subd. 2, of the Penal Code it was the duty of the district attorney to charge in the information that defendant was armed at the time of his arrest. The court did not err in receiving the revolver in evidence.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

---

36 Cal.App.2d 41

PEOPLE v. PAYTON.

Cr. 3263.

District Court of Appeal, Second District, Division 1, California.

Dec. 11, 1939.

Hearing Denied Jan. 8, 1940.

1. Criminal law 🔑1144(13)

On appeal from judgment on verdict of conviction, evidence must be viewed in light most favorable to prosecution.

2. Criminal law 🔑200(3)

One charged with theft of money of one from whom accused received it in payment for hay purchased from third person was not placed in jeopardy twice for same offense because he could be charged with embezzlement of seller's personal property, in view of statute, merging crimes of larceny, embezzlement, and obtaining money by false pretenses into crime of theft, and court's instructions as to crimes of grand theft, including obtaining of money by false pretenses, larceny by trick and device, and theft by means of embezzlement. Pen.Code, § 484.

3. Larceny 🔑55

In trial for grand theft, evidence *held* sufficient to support jury's necessary finding by verdict of conviction that defendant's crime consisted of taking money belonging to complaining witness, not seller of hay, for which money was paid to defendant by such witness. Pen.Code, § 484.

4. Criminal law 🔑742(2)

In trial for grand theft, whether state's witness, denying his criminality or participation in unlawful scheme with defendant, was defendant's accomplice, so as to require corroboration of his testimony, was for jury to determine. Pen.Code, § 1111.

5. Criminal law 🔑742(2)

Whether state's witness was defendant's accomplice is question for jury, though there is evidence tending to connect witness with crime charged, where facts are disputed or susceptible of different inferences. Pen.Code, § 1111.

6. Criminal law 🔑507½, 742(2)

In trial for grand theft, evidence *held* sufficient to take to jury question whether state's witness was defendant's accomplice and sustain its determination that he was not accomplice, so that corroboration of his testimony was unnecessary. Pen.Code, § 1111.

7. Criminal law 🔑511(7)

In trial for grand theft, defendant's admissions in his testimony *held* sufficient to corroborate testimony of state's witness claimed to be accomplice. Pen.Code, § 1111.

8. Criminal law 🔑511(1)

Corroboration of accomplice's testimony as to some material facts is sufficient to authorize inference by jury that he testified truly as to matters concerning which he was not corroborated. Pen.Code, § 1111.

9. Criminal law 🔑511(3)

An accomplice's testimony need not be corroborated by direct evidence, but defendant's entire conduct may be inquired into for corroborating circumstances, and corroboration is sufficient, if defendant's connection with crime charged may be fairly inferred from such conduct. Pen.Code, § 1111.

10. Criminal law ⇨511(2)

In trial for grand theft, evidence corroborating claimed accomplice's testimony *held* sufficient to connect defendant with commission of such offense, so as to sustain conviction thereof. Pen.Code, § 1111.

11. Criminal law ⇨511(4)

In trial for grand theft of money received by defendant from prosecuting witness in payment for hay belonging to third person, a purported bill of sale, executed by defendant without authority, evidence that it served to carry out, contained some statement of, and was based on, false pretense that defendant had right to transfer title to hay, and complaining witness' testimony, corroborated by circumstances, as to such pretense, constituted sufficient proof thereof to warrant conviction of offense charged. Pen.Code, § 1110.

12. False pretenses ⇨49(1)

To establish false pretenses as element of grand theft, satisfactory corroboration of defrauded person's testimony by material circumstances is sufficient. Pen.Code, § 1110.

13. Criminal law ⇨1159(4)

The appellate court does not sit as judge to determine fact issues on credibility of witnesses' testimony, and it cannot reject evidence on which jury acted, unless appellant shows that such evidence was inherently improbable or incompetent or for some other reason did not constitute legal evidence on which jury was entitled to rely.

14. Witnesses ⇨363(1), 370(1)

A witness' bias, prejudice, interest, and hostility or friendship toward parties litigant are subjects for investigation in trial of case.

15. Witnesses ⇨370(4)

An inquiry on cross-examination of defendant's witness as to facts that she had been living with defendant and borne him two children, though not married to him, was proper as tending to show her friendly interest in defendant, which would bear on question of credibility of her testimony.

16. Criminal law ⇨722(3)

In trial for grand theft, district attorney's remarks, in argument to jury, that he wondered whether defendant asked state's witness to cash prosecuting witness' check for defendant at store because defendant had obtained bad reputation in locality in connection with checks, were not improper, in view of evidence that defendant made out check with payee's name blank, gave it in such condition to state's witness to cash, and admitted prior conviction for issuing fictitious checks.

17. Criminal law ⇨1037(2)

Where defendant's counsel did not request trial court to admonish jury to disregard district attorney's alleged improper remarks in argument to jury, but merely objected thereto on grounds that there was nothing in evidence about subject matter thereof and that argument was not proper, reversal of judgment on verdict of conviction because of such remarks is unwarranted.

18. Criminal law ⇨761(15)

In trial for grand theft, instruction to convict, if jury believed from evidence beyond reasonable doubt that defendant knowingly and designedly made representations and pretenses testified to by prosecuting witness, was not erroneous as assuming that such witness testified that representations and pretenses were knowingly and designedly made by defendant.

19. Criminal law ⇨823(5)

In trial for grand theft, alleged infirmity in instruction to convict, if defendant knowingly and designedly made representations and pretenses testified to by prosecuting witness, because of failure to state that there must be felonious intent or taking, was cured by instructions on intent to defraud which must be established to sustain conviction.

20. Indictment and Information ⇨11(3)

A judgment on conviction of grand theft was not void as based on amended information filed without court order, where record disclosed that deputy district attorney stated on day case was called for trial that defendant was charged with grand theft in amended information "filed with the consent of the court" and that it was filed in open court on district attorney's motion.

21. Criminal law ⚷1032(4)

Defendant making no objection to filing of amended information, alleging his prior conviction of felony, or to his arraignment thereon, when deputy district attorney asserted that it was filed with court's consent, cannot first raise point on appeal that it was filed without court order. Pen.Code, § 969a.

22. Indictment and Information ⚷161(3)

The superior court had right and owed duty to permit filing of amended information, alleging defendant's prior conviction of felony, on day set for his trial under original information charging grand theft. Pen. Code, § 969a.

23. Criminal law ⚷1032(4)

Defendant, acquiescing in course pursued with reference to filing of amended information, charging prior conviction of felony, should not be heard to complain on appeal from judgment on conviction of offense charged in original information that such judgment is void because amended informaation was filed without court order. Pen. Code, § 969a.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Frank C. Payton was convicted of grand theft, and he appeals.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Defendant appeals from the judgment pronounced following his conviction of the crime of grand theft.

[1] Viewing the evidence in the light most favorable to the prosecution, as we are bound to do following a guilty verdict, we find in the record, testimony to the effect that defendant, a man about 38 years of age, who had lived in Los Angeles county practically all his life, was employed for some twelve years as a hay salesman, and at the time here pertinent was working in that capacity for his brother, the lattter of whom was a wholesale hay dealer. Mr. Zualet, the complaining witness, was a dairyman at Artesia in Los Angeles county. He had known the defendant for about three years and had previously purchased hay from him. In connection with the occasion which forms the basis of the instant charge there is testimony that about October 8, 1938, defendant called at Zualet's dairy to try to sell the latter some hay. Mr. Zualet did not have a barn in which to store hay, and was interested in buying hay in storage that he could withdraw from time to time as he needed it. Defendant then informed the complainant that a Mr. Rieger had some hay in storage with a big barn and promised to see what hay the latter had. On that same day the defendant went to Rieger's wholesale hay yard at 2902-2908 Flower street in Hynes and told Rieger that he had a dairyman who wanted 100 tons of alfalfa hay, asking if Rieger would have that amount on hand the following morning. Receiving an affirmative reply, defendant returned the next morning about 7:30 o'clock and examined the hay at Rieger's yard. Informing Rieger that he was going after the dairyman to bring him over to look at the hay, defendant departed, returning about 9 o'clock in company with Mr. Zualet. Upon this occasion there were about 100 tons of baled alfalfa hay on trucks in the yard. Defendant and Zualet examined it. The former in the presence of the latter asked Rieger the price, and the sum of $14 per ton was quoted. There was some talk about storing the hay, and then the three walked to the warehouse to show prospective customer Zualet where the hay would be stored. In the warehouse there were two sections, numbered 23 and 24, each of which contained some alfalfa hay, upon which Rieger also quoted a price of $14 per ton to the defendant and Zualet. Rieger then went and got the warehouse records of his hay, the number of bales and the weight, noting them on a slip of paper which he gave to the defendant. Rieger then left and went to his office, and defendant and Zualet remained some fifteen or twenty minutes in the yard examining the hay. Defendant then sought out Mr. Rieger and asked him if he would keep this hay until 2 o'clock, because the complainant, Zualet, was figuring on leasing a building; to which Rieger replied that he guessed the hay would still be there. However, at 2 o'clock the defendant returned and told Mr. Rieger the deal for the hay was off. It appears that the price quoted was to include storage up to the following June 1, but the insurance was to be extra at the

rate of three per cent of the purchase price. Defendant did not again see Rieger until after the former was arrested and at the time of his preliminary hearing.

After defendant and Zualet left Rieger's place on the morning of October 9 they did not see each other again until defendant went back to Zualet's dairy in the latter part of the afternoon of October 11, between 3 and 4:30 o'clock. At that time they discussed the hay deal, defendant endeavoring to persuade Zualet to pay the $14 and the latter insisting he would pay only $13.50 per ton. Finally defendant advised the complainant that he was going to see Mr. Rieger again and endeavor to induce him to sell the hay for $13.50. Defendant then left the complainant's place and came back later that same evening, telling the latter that he could have the hay at $13.50 per ton. Upon this last-named occasion the defendant asked the complainant for a check, and the latter in reply asked the defendant if he had the necessary papers. Defendant said he would bring them the following day and Zualet promised to give him the check at that time.

About 7 o'clock on the following morning, October 12, 1938, Columbus Day, a legal holiday, defendant met with a fellow salesman, Ray Koopman, at defendant's brother's place in Norwalk, for whom they both worked as hay salesmen, and defendant asked Koopman if the latter wanted to ride along with him, which invitation Koopman accepted, and they drove away in the defendant's brother's car, the defendant telling Koopman that he had a deal on and asking the latter if he had a typewriter, saying, according to Koopman, that "he wanted to make out a sort of receipt or something to confirm the sale if it was made". Defendant and Koopman drove to the home of the latter's father and there procured Koopman's sister to typewrite a paper spoken of in the evidence as a receipt and reading as follows:

"October 12, 1938.

"Sold to Zualet Brothers, by Frank Payton, alfalfa hay stored in warehouse on Flower Street in Hynes, Sections 23 and 24 of the warehouse.

373 bales, 47,177 pounds,
366 bales, 43,149 pounds,

Total 90,326 pounds at $13.50
per ton, $609.70.
"(Signed) Frank Payton."

This instrument was typed by Koopman's sister at the request of the defendant, and from the information given by defendant a well as from figures which he had on a paper that he read from.

Leaving Koopman's father's place, defendant and Koopman drove over to the complainant's place, arriving there about 8:30. Defendant said that he had brought the papers, and Zualet handed defendant his checkbook and asked the latter to make out the check. Zualet had previously dealt with defendant in connection with the purchase of hay and on these former occasions had asked the defendant to write out the body of the checks for him because of Mr. Zualet's meager knowledge of the English language and his impaired ability to write. Defendant wrote two checks, one for $22.50 and one for $587.20, totaling the $609.70 alleged in the information to have been stolen. He filled in the date and the amount of the checks, but left the names of the payees blank. He handed the checks to Zualet and the latter signed them as the drawer thereof. Both checks were drawn on the First National Bank of Bellflower. When the checks were delivered to defendant the latter signed the so-called receipt heretofore referred to and gave it to Zualet.

Following the receipt of the two checks from the complainant, defendant and Koopman drove to Bellflower, a distance of about two miles, and stopped in front of the Central Market, where defendant said to Koopman, "Well, it is a holiday today, isn't it?" to which Koopman replied, "I guess so." Thereupon defendant handed Koopman the $22.50 check and said, "I got a small check I would like cashed to get some clothes," and asked Koopman if he could cash it for him. Koopman took the check into the Central Market, where he was known, got a pencil and filled his own name in as payee, endorsed the check and cashed the same. Receiving the money, he went outside to the automobile where defendant was waiting, and gave the $22.50 to the latter, who paid Koopman $5 which he owed him. There is also evidence that Koopman had previously cashed checks for the defendant.

On the following morning, October 13, defendant and Koopman drove to Bellflower and parked directly across the street from the First National Bank. It was about 10 o'clock, and after they got out of the car defendant handed a folded check to Koopman and asked him if he would cash it for him. Koopman went into the bank, opened the check, noticed the absence of a payee thereon, and filled in his own name as such, cashing the check in the bank. Leaving the bank, Koopman walked across the street to the automobile and gave the defendant the money. At that time one R. G. Curtis came upon the scene, and defendant gave him $40 he had borrowed a few days before. That same afternoon defendant, together with Koopman, a Miss Emens and another woman left by automobile for San Francisco, arriving there the following day. While there they visited the Bay Meadows race track, and the expense of the entire trip was paid for by defendant. On the last-named day Koopman borrowed some money from defendant to enable him to pay his bus fare back to Los Angeles and returned home, arriving on the 15th. There is testimony that defendant had a large roll of paper money with him on the trip, out of which he paid the expenses. Defendant remained on the trip some ten days after Koopman's return. The two checks in question were paid by the bank and charged against the account of the complainant. The latter never received any hay from Mr. Rieger on this transaction, but did subsequently purchase some hay direct from Mr. Rieger, paying the latter therefor. The evidence indicates that at the time complainant delivered the checks to the defendant he believed defendant had the right to sell the hay in question and that he gave the checks in payment therefor. The hay dealer, Mr. Rieger testified that defendant was not employed by him and that he never saw the receipt until it was subsequently shown to him by a police officer. He never authorized defendant to make out any such receipt and stated the fact to be that the defendant told him the deal was off. According to Rieger's testimony, his first knowledge that defendant had sold his hay to Mr. Zualet was about October 15th or 16th, when Mr. Zualet called at Rieger's office.

Testifying as a witness in his own behalf, defendant admitted signing the so-called receipt, delivering the same to the complainant and receiving from the latter the checks in question. Defendant admitted he asked Koopman to cash the $22.50 check, which he said was made out in that amount as his commission for making the deal. With reference to the larger check, defendant testified that on the morning of October 13th he gave the checks to Mr. Koopman with instructions to deliver the same to Mr. Rieger and that it was his belief, up to the time of his arrest, that Koopman had done so.

[2, 3] The first contention of appellant is that the evidence is insufficient to support the judgment. Appellant's claim in this regard, that because he was charged with the theft of $609.70 of the personal property of Zualet when under the facts of the case he could be charged with the embezzlement of $587.20 of the personal property of P. J. Rieger, the seller of the hay, and could and would thereby be placed in jeopardy twice for the same offense, is untenable. The amendment of Penal Code section 484 in 1927 merged into the crime of theft the then existing crimes of larceny, embezzlement and obtaining money by false pretenses. People v. McCarthy, 140 Cal.App. 386, 35 P.2d 621; People v. Breyer, 139 Cal.App. 547, 34 P.2d 1065, 1067; People v. Bratten, 137 Cal.App. 658, 31 P.2d 210. Therefore the amended information charging grand theft included both the offenses of embezzlement and obtaining money by false pretenses. The court fully instructed the jury with reference to the crime of grand theft, including the obtaining of money by false pretenses, as well as the elements necessary to establish the same. The jury was also correctly advised by appropriate instructions as to larceny by trick and device and the necessary ingredients thereof; and as well were correctly instructed concerning the crime of theft by means of embezzlement. By their verdict the jury necessarily found that the crime committed by defendant consisted of his taking $609.70 belonging to the complaining witness Zualet, thereby determining that the money did not belong to Mr. Rieger and consequently was not taken from the latter. Such a conclusion finds ample support in the testimony of Mr. Reiger himself when he testified that the appellant was not in his employ; that he had never employed him though he had paid him a commission on a sale of hay on a different occasion, but that he did not tell appellant he would pay him any commission on this occasion, and in fact was advised by appellant that the deal was not consummated. Mr. Rieger testified he never saw either of the two checks issued by Mr. Zualet and delivered to appellant; never saw the receipt or bill of sale for the hay until it was shown to him by an officer, and that he never authorized appellant to sign or deliver any

such instrument. Appellant admitted he was employed by his brother and not by Rieger. The record is barren of any testimony that appellant was entrusted with the hay or that he was given any authorization to deliver it or transfer title to it. In fact, appellant's statement that he was to receive fifty cents per ton commission was based solely upon his conclusion and understanding from previous transactions. On the other hand, the evidence admits of but one conclusion, and that is that appellant clearly led the complaining witness to believe that the latter was buying Rieger's hay stored in Rieger's barn. Finally, Mr. Rieger parted with nothing, and the only person defrauded was complainant, Zualet, who lost $609.70, and the jury by its verdict so determined.

[4, 5] Appellant next challenges the sufficiency of the evidence on the ground that the witness Koopman was an accomplice and that his testimony was not corroborated as required under section 1111 of the Penal Code. We have no hesitancy in saying that Koopman was not an accomplice, and even if he were, his testimony was abundantly corroborated. We are not here confronted with the situation usually surrounding a trial when the question of whether a witness is an accomplice is one of law for the court. That occurs, it is true, when the accomplice comes upon the stand admitting his complicity in the commission of the offense; but where, as here, the witness denied any criminality or participation in any unlawful scheme with the defendant, the question of whether he was an accomplice was for the jury to determine, and under the evidence produced they were entitled to determine as a fact that Koopman was not an accomplice. As is said in Corpus Juris, volume 16, page 677, "the question of accomplicity is one to be decided by the jury where, although there is evidence tending to connect the witness with the crime, the facts are disputed or susceptible of different inferences".

[6] The jury was fully and correctly instructed as to what constitutes an accomplice, and the court was correct in submitting to them for determination that question so far as the witness Koopman was concerned. That Koopman was not an accomplice seems to us to be clearly established by the testimony of appellant himself, which was that he asked Koopman to cash the $22.50 check for him and received the proceeds thereof; while as to the $587.20 check appellant never contended that Koopman aided or abetted or assisted him by cashing the other check for $587.20, but, on the contrary, insisted that he gave Koopman that check to deliver to Rieger to pay for the hay, and that he never saw the proceeds of the same, thereby negativing any claim that appellant and Koopman were accomplices, but, on the contrary, contending that appellant was innocent and that Koopman was the guilty party.

[7-9] Concerning corroboration of Koopman's testimony, we find appellant's admission that he personally wrote out the body of the two checks leaving the names of the payees blank; that he received the checks in payment for hay he was never authorized to sell or deliver for $13.50 per ton, and in fact hay concerning which he himself advised the seller that the deal for its sale was off. Appellant further admitted by his own testimony that he obtained a portion of the property secured from Zualet when he received the $22.50 represented by the check which Koopman cashed at appellant's request. Concerning appellant's contention that Koopman's testimony lacks corroboration in regard to the receipt and disposition of the proceeds of the larger check of $587.20, it is sufficient answer to say that Koopman is admittedly corroborated as to other material testimony, such as the cashing of the $22.50 check and the delivery of the proceeds thereof to appellant. It needs no citation of authority for the statement that if the accomplice is corroborated as to some material facts or facts this is sufficient to authorize an inference by the jury that he has truly testified with respect to matters as to which he has not been corroborated, and thus to sustain a conviction. Further, it is well settled that the testimony of an accomplice need not be corroborated by direct evidence. The entire conduct of defendant may be inquired into for the corroborating circumstances, and if from such conduct and behavior on the part of the defendant the connection of the accused with the crime may be fairly inferred, the corroboration is sufficient. People v. Entriken, 106 Cal.App. 29, 35, 288 P. 788; People v. Schumann-Heink, 106 Cal.App. 81, 87, 288 P. 838.

[10] From a review of the evidence narrated herein, as well as from other facts and circumstances appearing in the record, we have no hesitancy in saying that the corroborating evidence was sufficient to connect the defendant with the commission of

the offense. One might remove from the record in this case the testimony of Koopman, and there would yet remain sufficient evidence from which the connection of the appellant with the alleged crime might reasonably be inferred. Briefly, such circumstances might be summarized as follows: The defendant accepted $13.50 per ton from Zualet when Rieger had refused to sell the hay for less than $14 per ton; he made out the checks himself, leaving the payee's name blank instead of making at least the larger check which was admittedly due Rieger show the latter as payee; that appellant received the proceeds of the $22.50 check out of which he repaid Koopman $5; that on the morning the larger check was cashed, while appellant and Koopman were together in the vicinity of the bank, defendant repaid one Curtis $40 which he had borrowed from him; and further, the defendant, who had been compelled to borrow small sums from Koopman and Curtis just previously, was nevertheless financially able on the day the $587.20 check was cashed, to take Koopman and two women to San Francisco.

[11-13] Appellant's further claim of insufficiency of the evidence, based as it is upon the contention that the only element of the theft upon which a conviction could be had under the instructions in this case is that of false pretenses and that the evidence in this respect fails to conform to the requirements of section 1110 of the Penal Code in that there is no false token or writing, and that any alleged false pretense on the part of appellant is not established by two witnesses or by one witness and corroborating circumstances, is without merit. In the case before us there is a memorandum in writing executed by defendant, and the same fully conforms to the requirements of a false token or writing demanded by section 1110. There is abundant evidence that the writing in the instant case served to carry out the false pretense, that it contained some statement thereof, and was based upon such false pretense. That is all that is required. People v. Pearson, 69 Cal. App. 524, 531, 231 P. 612. The purported bill of sale or token was false in that it purported to make the sale of hay when the appellant had no such hay, the commodity in fact belonging to Rieger; that defendant had no authority to execute such a bill of sale and certainly had no authority to execute a bill of sale of Rieger's hay for less than $14 per ton. It was used to lend strength to the false pretenses, and although it had neither value nor validity it served to convince the complaining witness Zualet of the right of appellant to transfer title to the property in question. Also a reading of the testimony, much of which is set out in this opinion, leads inevitably to the conclusion that there was a compliance with the latter portion of section 1110 in that the pretenses were proven by the testimony of the complaining witness and corroborating circumstances, which need not here be reiterated. It is sufficient if the testimony of the person defrauded is satisfactorily corroborated by material circumstances. That such corroboration of the complaining witness was presented in this case cannot be denied. People v. La France, 28 Cal.App.2d 152, 156, 82 P.2d 465. Conceding the existence of conflict in the evidence, it must be remembered that the appellate court does not sit as a judge to determine the issues of fact upon the credibility of the testimony of the witnesses; and when we are asked to reject evidence upon which the jury acted it is necessary for appellant to show that such evidence is inherently improbable or that it was incompetent, or for some other reason does not constitute legal evidence upon which the jury was entitled to rely. There is no such showing here. The jury was not bound to disregard the incriminating evidence and to accept the defendant's denial of any wrongdoing.

[14, 15] Appellant next complains of the cross-examination by the district attorney of a witness, Emeline Emens, called by the defense, during which interrogation it was brought out that the witness and appellant, although not married to each other, had been living together, and that she had borne him two children. The following constitutes the cross-examination complained of:

"By Mr. O'Brien (Deputy District Attorney):

"Q. How long have you known Mr. Payton? A. I have known Mr. Payton approximately eight years.

"Q. You have lived with him as man and wife for years, haven't you?

"Mr. Oster: That is objected to as not proper cross-examination.

"The Court: It shows interest, although I won't be sure you have some—

"Mr. O'Brien: I certainly, if your Honor please, have been so told or I would not ask that question.

"The Court: All right. You may answer.

"Q. By Mr. O'Brien: Did you understand the question? A. I don't know what it was now.

"(The reporter read the last question.)

"A. Is that what,—for a year?

"Q. For any time? A. I have.

"Q. As a matter of fact, you have two children by him, haven't you?

"Mr. Oster: I object to that as not proper cross-examination.

"The Court: It shows interest.

"Mr. Oster: I assign the asking of the question as misconduct, and ask your Honor to instruct the jury to disregard it.

"The Court: Denied. She may answer.

"A. I have."

We perceive no error in the trial court's ruling. It is elementary that the state of mind of a witness as to bias, prejudice, interest involved, hostility or friendship toward parties litigant, are all subject for investigation in the trial of a case. In the case at bar the inquiry was proper as tending to show that the witness cherished a friendly interest in appellant which would bear upon the question of the credibility of her testimony. People v. Souleotes, 27 Cal.App. 288, 289, 149 P. 802; People v. Crandall, 125 Cal. 129, 136, 57 P. 785. As was said in People v. Peter, 125 Cal.App. 657, 663, 14 P.2d 166, 169, where a witness was asked if she and appellant therein had not lived together as husband and wife, "If the witness had lived with appellant in the relationship of husband and wife, this circumstance would, without doubt, be one which the jury could rightly consider as a factor in arriving at the motive of the witness and the weight to be given to her testimony." The cases cited by appellant in support of the general rule that the prosecution may not introduce evidence designed merely to degrade and prejudice the defendant before the jury are not here applicable, for the reason that such cases hold that the admission of such evidence is error only where it bears no materiality to the issues involved in the case. In the matter before us the testimony was admissible because it was pertinent to the question of the interest of the witness in the defendant and the outcome of the trial.

[16, 17] Appellant next assigns as misconduct the action of the district attorney in his argument to the jury when the prosecutor said:

"You will remember that it was on the 12th day of October, 1938, that these two checks came into the possession of Mr. Payton. That, as we all know, was Columbus Day, and the banks were closed. It would appear on that particular date that Mr. Payton at least needed some money, so it was he had this smaller check made so that he could cash it down there at some of the stores. He, of course, did not cash it. He asked Mr. Koopman to go in and cash it for him. I wonder if the reason was that Mr. Payton, who had lived down there for a long time, had not acquired or obtained a bad reputation for himself in connection with these checks—

"Mr. Oster: If your Honor please, I object to that; nothing in the evidence about that, and it is not proper.

"The Court: It is a matter of argument.

"Mr. O'Brien: He told you he was convicted of a crime of issuing checks without sufficient funds, and lived down in that locality for 28 years. It is fair to assume, I would say, from that kind of testimony that everybody in that community knew him, knew that he had put out at least one bad check and been convicted for it. Therefore, it would be far more difficult for him to put over a check than it would be for a man like Ray Koopman apparently who has no bad reputation."

When it is remembered that there is evidence that appellant made out both checks in question and left the names of the payees blank; gave them in that condition to Mr. Koopman to cash instead of cashing them himself, and that he admitted a prior conviction in connection with fictitious checks, we are impressed that the district attorney was well within his rights in addressing the jury as he did. Further, counsel for appellant did not request the trial court to admonish the jury to disregard the remarks in question, but was content to rest upon an objection made on the ground that "nothing in the evidence about that, and it is not proper". In the face of the record before us, defendant having failed to make such a request for an appropriate admonition to the jury, a reversal of the judgment based on such an alleged error under the authorities would be unwarranted. People v. Chilcott, 18 Cal.App.2d 583, 64 P.2d 450; People v. Davidson, 23 Cal. App.2d 116, 119, 72 P.2d 233. We find no impropriety in the argument of the district attorney that would stigmatize it as improper, and even though the remarks of the prosecutor be deemed improper, they were certainly not of that extreme character that the error could not be cured by a timely admonition or instruction to the jury, neither of which was requested.

[18, 19] Appellant complains of an instruction given by the court relating to false pretenses. That portion of the instruction to which objection is made reads as follows: "The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that * * * the defendant knowingly and designedly made the representations and pretenses testified to by the witness, A. Zualet, or any of said representations or pretenses * * *." Criticism of the foregoing instruction is thus stated by appellant in his brief:

"This instruction assumes as a fact that the witness A. Zualet testified to representations and pretenses knowingly and designedly made by the defendant. It charges the jury on a matter of fact and is an invasion of the right of the jury to determine whether or not the witness A. Zualet testified to representations and pretenses made by the defendant. * * *

"Further objection to the above instruction is made by appellant in that this is the only instruction which directs a conviction if the jury find the facts therein to be true beyond a reasonable doubt. Nowhere in the instruction are the jury told that there must be a felonious intent or felonious taking."

The first part of appellant's criticism cannot be sustained because it is at once apparent that the instruction does not assume that the complaining witness Zualet testified that representations and pretenses were knowingly and designedly made by defendant, but clearly and unequivocally advises the jury that *if they believed* that the defendant made the representations testified to by the witness Zualet, etc. That Zualet did testify to the making of certain representations by defendant is unquestioned. In fact, appellant admitted making the representations attributed to him by Zualet. Referring to the last part of appellant's criticism, we find no merit therein. The alleged infirmity complained of was fully cured by some nine instructions wherein the jury was directly and repeatedly instructed upon the "intent to defraud" which must be established to sustain a conviction.

[20-23] Finally, appellant charges that the judgment is void because the amended information "was filed without an order of the court". At the time of the filing of the amended information, which was on the day the case was called for trial, the record discloses the following proceedings as having taken place:

"Mr. O'Brien (Deputy District Attorney): If your Honor please, there has been prepared an amended information upon which the defendant has not been arraigned, I believe.

"The Court: You better arraign him.

"Mr. Oster: May we approach the bench? (Thereupon the following occurred at the bench outside of the hearing of prospective jurors in the room):

"Mr. O'Brien: It just charges a prior, that is all. Here it is, right here (indicating).

"Mr. Oster: It has not been filed yet, has it?

"Mr. O'Brien: Here is your copy (handing document to Mr. Oster).

"Mr. O'Brien: Frank C. Payton, is that your true name?

"The Defendant: Yes.

"Mr. O'Brien: You are charged in an amended information filed by the District Attorney of this county, in Case No. 74,574 *filed with the consent of the Court,* with the crime of grand theft, it having been committed on or about the 12th day of October ——(Italics added.)

"Mr. Oster: We waive the further reading.

"Mr. O'Brien: To that amended information, how do you now plead, guilty or not guilty?

"Mr. Oster: We plead not guilty, and admit the prior.

"Mr. O'Brien: There is the additional allegation, that before the facts set forth in this amended information, on the 14th day of August, 1934, in the Superior Court of the State of California, in and for the County of Los Angeles, you were convicted of issuing checks without sufficient funds, a felony. Do you admit or deny that prior?

"Mr. Oster: We admit it.

"The Court (addressing the clerk): When you read the information, omit the prior. Call the jury."

A mere reading of the foregoing at once indicates from the statement of the district attorney that the amended information in question was "filed with the consent of the court". The record also discloses that it was "filed in open Superior Court of the County of Los Angeles, State of California, on motion of the District Attorney of said Los Angeles County". The amended information did not in any manner change the substantive charge against appellant, but simply alleged his prior conviction of a felony. By its terms section 969a of the Penal Code makes the filing of such an amendment mandatory; and where, as here, the district attorney asserted that such amended information was filed with the consent of the court and defendant made no objection to either the filing of the same or his arraignment thereon, he cannot for the first time raise the point on appeal that the pleading was filed without an order of court. Furthermore, the court had the right to permit the filing of the amended information; indeed, it was plainly the duty of the court so to do (Pen.Code, § 969a); and such action of the court would not have been subject to objection, if any had been made. An additional reason why appellant should not now be heard to complain is that he acquiesced in the course that was pursued with reference to the filing of such amended information.

Appellant having been fairly tried and justly convicted, the judgment appealed from is affirmed.

We concur: YORK, P. J.; DORAN, J.

PEOPLE, on Complaint of CHAPMAN, v. RAPSEY.*

Civ. 11062.

District Court of Appeal, First District, Division 2, California.

Dec. 13, 1939.

Hearing Granted Feb. 8, 1940.

1. Officers 🔑30

The offices of city judge and of city attorney of a city of the sixth class are not "incompatible" so as to render it unlawful for one person to hold both positions. Gen.Laws 1937, Act 5233, §§ 852, 879, 882; Code Civ.Proc. § 170 et seq.; Pol.Code, § 4153.

[Ed. Note.—For other definitions of "Incompatible," see Words & Phrases.]

2. Officers 🔑30

Where the official duties of city judge of a city of the sixth class are fixed by statute, statute alone must be looked to in order to determine whether the offices of city judge and of city attorney of a city of the sixth class are incompatible so as to make it legally impossible for one person to hold both positions. Gen.Laws 1937, Act 5233, § 852, 879, 882; Code Civ.Proc. § 170 et seq.; Pol.Code, § 4153.

3. Officers 🔑30

The position of city attorney of a city of the sixth class is not an "office" within the rule relating to incompatible offices. Gen. Laws 1937, Act 5233, §§ 852, 879, 882; Code Civ.Proc. § 170 et seq.; Pol.Code, § 4153.

[Ed. Note.—For other definitions of "Office (Public or Private Employment)," see Words & Phrases.]

4. Officers 🔑1

Essential characteristics which differentiate a "public office" from mere "employment" are an authority conferred by law, a fixed tenure of office, and the power to exercise some portion of the sovereign functions of government.

5. Officers 🔑1

The characteristic features which distinguish an "office" from a mere "employment" are the manner of appointment and the nature of the duties to be performed, whether the duties are such as to pertain to the particular official designation, and are continuing and permanent and not occasional or temporary.

[Ed. Note.—For other definitions of "Employment," see Words & Phrases.]

6. Officers 🔑55(2)

The rule that one forfeits or is ousted from a public office when he accepts another which is incompatible is a rule of the common law, but where the statutes prescribe the qualifications of and the grounds of removal from a public office the provisions of the statutes will prevail over the rule of the common law.

7. Quo warranto 🔑2

Since the Code of Civil Procedure authorizes quo warranto to oust one who usurps or unlawfully holds a public office, the

---

*For subsequent opinion see 107 P.2d 388.

groundwork of the action rests upon the statutory provisions constituting usurpation and unlawful holding rather than upon the common law. Code Civ.Proc. § 803.

8. Quo warranto ⚷14

Quo warranto will not lie to oust incumbent of office of city judge of city of the sixth class on ground that he had accepted appointment as city attorney of such city, since there is nothing in the Constitution or the statute which renders the city judge ineligible to hold his office because of his acceptance of some other employment. Gen. Laws 1937, Act 5233, §§ 852, 879, 882, 884; Code Civ.Proc. § 170 et seq., § 803; Pol.Code, §§ 58, 842, 4153; Const. art. 6, § 18.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Quo warranto proceeding by the People of the State of California, on the complaint of B. C. Chapman, against Rudolph A. Rapsey, to oust defendant from the office of city judge of the city of San Bruno on the ground that he had accepted another incompatible office, which was that of city attorney. From a judgment dismissing the proceeding, plaintiff appeals.

Judgment affirmed.

Earl Warren, Atty. Gen., Leon French, Deputy Atty. Gen., and Kirkbride & Wilson, of San Mateo, for appellant.

J. W. Coleberd, of So. San Francisco, for respondent.

NOURSE, Presiding Justice.

The People sued in quo warranto to oust defendant from the office of city judge of the city of San Bruno on the ground that he had accepted another incompatible office—that of city attorney. A demurrer to the complaint was sustained, and judgment of dismissal was entered. The appeal presents the single question whether the complaint states a cause of action. It should be noted that the complaint merely pleads the procedural steps under which defendant was appointed to both positions. No facts are pleaded supporting the claim of incompatibility of the two positions.

The city of San Bruno is one of the sixth class organized under section 850 et seq. of the Municipal Corporations Act. (Deering's Gen.Laws, Act No. 5233.) The office of city judge is created by section 882 of the act. The position is filled by appointment by the city council under section 852. The city council is authorized in its discretion, to appoint a city attorney to hold during the pleasure of the council. (Sec. 852.) The duties of the city attorney are thus defined in section 879: "It shall be the duty of the city attorney to advise the city authorities and officers in all legal matters pertaining to the business of said city, to frame all ordinances and resolutions required by the city council, and perform such other legal services as said city council may require from time to time. Said city attorney shall receive such compensation as may be allowed by the city council."

In contrast with the provisions of the act relating to the duties of city attorneys of cities of the fourth and fifth classes, it should be noted that the city attorney of a city of the sixth class is not required to prosecute criminal cases in the city court, but that his duties relate to "legal matters pertaining to the business" of the city. If he were called upon to represent the city in a civil matter to be heard in the city court the question of his qualification to act in his judicial capacity would be answered by reference to section 170 et seq. in the Code of Civil Procedure.

[1] The judgment must be affirmed for these reasons: That the positions are not as a matter of law incompatible; that the position of city attorney held by respondent is not a public office, and that the case pleaded is not one in which quo warranto will lie.

[2] Since the official duties of the city judge are fixed by the statute common to those of a justice of the peace, it would be necessary to find in the statute some duty required of the city attorney inconsistent with such duties. Appellant argues that he might be required to prosecute violations of ordinances which as city attorney he had drafted. But section 880 of the act imposes that duty upon the chief of police, and section 4153 of the Political Code requires the district attorney to attend before the magistrate and to conduct all prosecutions for public offenses. In his work on Public Officers, Mr. Mechem says (sec. 422): that the incompatibility of official functions that will operate to vacate the first office must be such as would "render it improper, from considerations of public policy, for one person to retain both", but that, "The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."

So in McQuillin on Municipal Corporations (2d Ed. revised), volume 2, page 142, it is said: "Offices which are declared by the adjudications to be incompatible 'are such as bear a special relation to each other; one being subordinate to and interfering with the other so as, in the language of Coke, to induce the presumption that they cannot be executed with impartiality and honesty'." We find nothing in the statutes relating to the duties of a city attorney of this class which would make his position incompatible with that of city judge. On the other hand, it is not difficult to find that he might perform all the duties assigned him by the city council under his contract of employment without conflict or interference with any of his duties as city judge. But, as we will hereafter point out, the statutes provide the remedy, and we need not look to the uncertain rules of the common law relating to incompatibility of public offices. We here refer to the provisions of section 170 et seq. of the Code of Civil Procedure, which in effect declare when the city attorney's duties are "incompatible" with those of the city judge, and which substitute for the common law rule requiring forfeiture of the first office held, the saner and more reasonable rule that the official is restrained from accepting or acting in the second office whenever the designated incompatibility arises.

[3-5] But the position of city attorney of a city of the sixth class is not an "office" within the rule relating to incompatible offices. The distinction between an officer and an employee is discussed at length by McQuillin in the volume above noted at pages 57 to 65 inclusive. On page 59 it is said: "The essential characteristics which differentiate a public office from mere employment are said to be: (1) An authority conferred by law, (2) a fixed tenure of office, and (3) the power to exercise some portion of the sovereign functions of government. In a New Jersey case, office is thus distinguished from employment. 'In every definition given of the word "office", the features recognized as characteristic, and distinguishing it from a mere employment, are the manner of appointment and the nature of the duties to be performed—whether the duties are such as pertain to the particular official designation and are continuing and permanent and not occasional or temporary.'"

Applying these rules to the instant case we find that a city attorney of a city of the sixth class has no fixed tenure and no power to exercise any sovereign functions. His duties are such as the city council may require in reference to legal matters. He may be employed to conduct specific litigation and may be paid by the month or on the basis of the work done. He is not required to take an oath of office, give an official bond, or reside in or become an elector of the city. He is thus an employee performing such duties as may be required of him by the city council. It will be presumed that the council would not require him to perform duties incompatible with those of the city judge which would render the functions of both or either invalid under the statutes.

[6-8] Finally, the complaint fails to plead a case where quo warranto would lie. That action may be maintained against one "who usurps, intrudes into, or unlawfully holds or exercises any public office". (Code Civ.Proc., sec. 803.) This presents at the outset the question of what is usurpation or unlawful holding of public office, and whether it is a question to be determined under ancient common law rules or under our prevailing codes. The rule that one forfeits, or is ousted, from a public office when he accepts another which is "incompatible" is a rule of the common law. Why he was not "ousted" or debarred from accepting the second office has not been explained, except on the theory that he has made an election. But where the statutes prescribe the qualifications of and the grounds of removal from a public office the provisions of the statutes will prevail over the rule of the common law. Hence, when the Code of Civil Procedure authorizes quo warranto to oust one who usurps or unlawfully holds a public office the groundwork of the action rests upon the statutory provisions constituting usurpation and unlawful holding. Section 842 of the Political Code reads: "Provisions respecting disqualification for particular offices are contained in the constitution and in the provisions of the codes concerning the various offices." Section 58 of the same code provides that "every elector" is eligible to the office for which he is an elector. Section 18 of article VI of the Constitution places certain restrictions on the eligibility of judges of the superior, municipal, and appellate courts, but none on the judges of inferior courts created by the legislature. Section 852 of the Municipal Corporations Act provides that the

city judge shall be appointed by the city council to "hold office during the pleasure of said city council". Section 882 provides that the city judge shall possess certain legal qualifications and section 884 provides for his disqualification to sit in certain cases. There is, however, nothing in the Constitution or the statutes which renders the city judge ineligible to hold his office because of his acceptance of some other public employment. To the contrary, the fact that the statute declares that he should hold at the pleasure of the city council negatives the theory that he forfeits his office by the acceptance of other employment.

To restate the matter—the legislature has created a public office and has furnished the means by which it shall be filled and the conditions under which it shall be occupied and vacated. The legislature having thus declared its policy it is not the function of the courts to declare that the legislature should have gone further and provided other conditions under which the office shall become vacant. For these reasons we hold that the rule of incompatibility, which is purely a court made rule, has no place in a jurisdiction where the statutes declare the rules of eligibility to public office, the conditions under which it may be held, and the grounds for which and the terms under which it may be declared vacated. Under such circumstances the courts cannot, through proceedings in quo warranto, declare that, in their judgment, other terms or grounds for removal should be applied to any particular office.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

---

36 Cal.App.2d 63

PEOPLE v. HURST.

Cr. 2081.

District Court of Appeal, First District,
Division 2, California.
Dec. 12, 1939.

1. Criminal law 🔑520(4)

Officers' inducement to defendant, immediately before defendant confessed, that officers did not care if defendant had pulled a hundred jobs, and that defendant would be booked on but one charge, if defendant "cleaned up all the complaints," was improper and was sufficient to render defendant's subsequent confession inadmissible, if timely objection was made in the trial court.

2. Criminal law 🔑1036(1)

A defendant could not complain in appellate court of admission of confession secured by improper inducement, where confession was admitted in the trial court without objection.

3. Criminal law 🔑1137(5)

A defendant could not complain in appellate court of admission of confession secured by improper conduct, where defendant's counsel brought defendant's confession into the record.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

John C. Hurst was convicted for petty theft, and he appeals.

Affirmed.

Kenneth Carlton Zwerin, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant was charged with petty theft and a prior conviction of a felony. He entered a plea of not guilty but admitted the prior conviction. After a waiver of a jury trial, he was tried by the court sitting without a jury, was found guilty and was sentenced to imprisonment in the state prison. He appeals from the judgment of conviction.

The proceedings upon the trial were very informal as is frequently the case when a jury trial is waived. The entire transcript of the testimony consists of but nine pages. The prosecution read certain testimony from the transcript of the preliminary hearing and a police inspector testified. Defendant did not take the stand and he offered no testimony. Both sides rested and after the court declared defendant guilty, defendant's counsel waived time for sentence and replied in the negative when asked if there was any legal cause why judgment should not be imposed. Defendant's counsel did request, however, a reference to the probation officer for investigation and the request was granted. When the cause was again called several weeks later, the motion for probation was denied and defendant was sentenced to the state prison. After sentence was imposed, defendant's counsel made a motion for new trial but subsequently withdrew said motion. The appeal from the judgment of conviction followed.

The evidence shows that on February 25, 1939, an overnight bag of the complaining witness, containing wearing apparel and toilet articles, was left in a locked automobile. The automobile was broken into and the bag was stolen during the absence of the complaining witness. Defendant was arrested later the same day while in the act of breaking into another automobile. The bag of the complaining witness was found in the room of the defendant. On the following day, defendant confessed that he had broken into the car of the complaining witness and had stolen the bag in question.

[1] Defendant contends that "The evidence is insufficient to support the verdict for the reason that the purported confession is inadmissible." In this connection, defendant points to certain testimony of the officers which indicates that they had told defendant, immediately before he confessed, that if "he cleaned up all the complaint", they did not care if he had "pulled a hundred jobs", he "would be booked on one charge, just one charge". Such inducement on the part of the officers was improper and would have been sufficient, if timely objection had been made in the trial court, to render the confession inadmissible. People v. Siemsen, 153 Cal. 387, 95 P. 863; People v. Gonzales, 136 Cal. 666, 69 P. 487; People v. Castro, 125 Cal. 521, 58 P. 133; People v. Bateman, 80 Cal.App. 151, 251 P. 335; 8 Cal.Jur., p. 109 et seq., secs. 201 and 202.

The peculiar circumstance presented by the record before us is that no objection whatever was made to the introduction of the confession. After defendant's counsel had been permitted to examine the officer prior to the admission of the confession, the officer was asked to relate the conversation with defendant. No objection was interposed and the officer related the main part of the conversation including the confession by defendant of the crime in question. The officer then said, "We asked him how many jobs he had actually pulled." Defendant's counsel interrupted by saying, "I don't think that that is admissible, your Honor. That will properly be before the court on the motion for probation. (To the witness.) In other words, you can confine yourself to this particular charge. He said he stole this bag, which is the subject of this prosecution, out of this automobile?" The witness replied, "He said he had broken into Mr. Gohler's car and took the bag out of the car." It is apparent that the foregoing suggestion of an objection went merely to the defendant's statement regarding the number of "jobs he had actually pulled". The only other suggestion of an objection found in the record was made later on redirect examination of the inspector. The prosecuting attorney propounded the following questions and received the following answers: "Q. You said you asked him how many jobs he had done? A. Yes. Q. What did he say? A. He did not know exactly." Counsel for defendant then said, "I think that would be inadmissible." After discussion, the court overruled the objection and the witness continued, "He said he did not know exactly how many, but he figured about twenty or twenty-five."

[2, 3] It is therefore clear that the only objections interposed were not objections to testimony regarding the confession of the particular crime but were objections to testimony as to defendant's statements concerning the number of crimes which he had committed. As the confession of the particular crime was admitted in the trial court without objection, the objection raised by defendant on this appeal comes too late. (8 Cal.Jur. 500, sec. 516.) In addition, it appears that defendant's counsel, by the question hereinabove set forth, did himself bring defendant's confession into the record, and defendant therefore cannot complain. People v. Silvers, 6 Cal.App. 69, 92 P. 506. There was ample evidence, with or without the confession, to sustain the conviction and a reading of the record convinces us that defendant's present contention was merely an afterthought following the imposition of sentence in the state prison rather than in the county jail.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

GIBSON et al. v. MENDOCINO COUNTY.*

Civ. 6301.

District Court of Appeal, Third District, California.

Dec. 4, 1939.

Rehearing Denied Jan. 2, 1940.

Hearing Granted Feb. 1, 1940.

1. Counties 🔑143

In action for injuries sustained when plaintiff was struck by courthouse door which was operated by self-closing apparatus, and fell to bottom of concrete steps leading to courthouse, evidence failed to sustain finding that plaintiff was struck while she was standing on metal plate which was located in front of the doorway and which contained a worn spot which allegedly made the entrance dangerous. Gen.Laws 1937, Act 5619, § 2.

2. Evidence 🔑5(2)

As respects liability of county for injuries sustained by plaintiff who fell when she was struck by courthouse door which was operated by self-closing apparatus, it is common knowledge that a self-closing apparatus in order to function properly exerts a sudden and powerful thrust outward. Gen. Laws 1937, Act 5619, § 2.

3. Negligence 🔑134(1, 11)

Plaintiff in negligence action has burden of showing by preponderance of evidence not only that defendant was guilty of negligence as alleged in complaint but that such negligence was the proximate or concurring proximate cause of the injury.

4. Counties 🔑223

In action for injuries sustained by plaintiff when she fell to bottom of concrete steps leading to courthouse, after she was struck by courthouse door which was equipped with an automatic self-closing device, evidence was insufficient to prove allegations that plaintiff was standing on smooth place on metal plate located on threshold and was struck as result of a sudden thrust of courthouse door and to prove that negligence of county was proximate cause of plaintiff's injury. Gen.Laws 1937, Act 5619, § 2.

◆

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Mary Gibson and husband against the Mendocino County for injuries sustained by the named plaintiff when she fell at entrance to county courthouse. From adverse judgment, the defendant appeals.

Reversed.

Mannon & Brazier and James E. Busch, all of Ukiah, for appellant.

Taft & Spurr, of Ukiah, for respondents.

Mr. Justice TUTTLE delivered the opinion of the court.

Plaintiff husband and wife commenced this action against the County of Mendocino under the provisions of section 2 of 1923 Statutes, p. 675, 1937 Deering, Act 5619, and charged the defendant county with negligence in maintaining the south entrance to the county courthouse. Mrs. Gibson had fallen there and sustained a serious injury to her knee. The case was tried without a jury, and judgment was entered in favor of the plaintiff wife in the sum of $7,000 and in favor of the plaintiff husband for $406.75. This appeal is from such judgment.

The plaintiff's cause of action is based upon the provisions of the act of the legislature of 1923, Stats. 1923, p. 675, Act 5619, Deering's Gen.Laws, which is as follows:

"Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." Sec. 2.

The factual structure of the case is so clearly set forth in the opinion of the trial judge in denying a motion for new trial that we have adopted it as part of this opinion, omitting, however, comments which are not statements of fact:

*For subsequent opinion see 105 P.2d 105.

"Plaintiffs' action is one to recover damages arising from personal injuries allegedly suffered by plaintiff Mary Gibson, as the result of the alleged dangerous or defective condition of the southerly entrance and doorway to the Mendocino County Courthouse. The courthouse in question is of the type rather common in northern California, and it might be more accurately depicted by designating it as the 'Rutherford B. Hayes' period of architecture. The southerly entrance consists of three concrete steps leading to a threshold or ledge 19 inches deep. This threshold is covered by a plate, originally of corrugated iron, which has a natural slope outward and downward from the door jamb of ⅜ of an inch. As the result of the corrugations having been worn off in the central portion thereof, the threshold has an added downward and outward slope of ⅛ inch by reason thereof, giving to the central portion of the plate a total outward and downward slope of approximately ½ inch. The entrance door, of solid wood construction, opens inwardly, and is now, and at the time of the accident was equipped with a patented closing device exerting a varied pressure upon the door of from eight to fifteen pounds at various points in the arc of the door swing. Plaintiff, Mary Gibson, a resident of Ukiah for about twenty-five years, was familiar with the doorway in question, with the iron threshold plate, and the fact that the door in question closed without any action upon the part of one using the same. Upon the day of the accident, Mary Gibson had walked down town on an errand, had another purchase to make on Standley Street, which is upon the north side of the courthouse, and started to go from Perkins Street through the southerly door of the courthouse to gain access to said Standley Street. It is not contended that Mary Gibson had any official business to transact in the courthouse upon the day in question, nor does such fact appear from the record. It appears that she was perhaps using the courthouse as a thoroughfare—which fact is not at all unusual. * * * Thus, Mary Gibson essayed the steps at the southerly entrance to the courthouse and safely ascended to the top and the threshold thereof, where she opened the door and proceeded in. As she stepped in the doorway the fire siren sounded an alarm, and 'having been burned out once', she turned quickly, took one step forward (outward) to count the number of blasts of the siren, and while so standing was struck by the closing door and precipitated to the bottom of the concrete steps."

It is contended by appellant that the evidence is insufficient to show the proximate cause of the injury, and, therefore, insufficient to support the finding that "said injuries were the result of the dangerous and defective condition of said south entrance to said courthouse, and of the negligence of defendant in so maintaining the same, as aforesaid", and the further more specific finding that "the plaintiff * * * while standing upon the aforesaid steel plate and attempting to enter said courthouse through the said door at the south entrance thereof, was struck by said door, operated as aforesaid, by the aforesaid self-closing apparatus, causing plaintiff to slip upon the inclined slippery surface of said steel plate".

It therefore becomes necessary to carefully consider the testimony of plaintiff, who was the sole witness to the accident. For an exact understanding of the physical facts involved, we have incorporated as part of this opinion plaintiffs' exhibit No. 1.

This shows the courthouse door in question, metal plate in front of the doorway, and the worn or smooth spot on said plate. The testimony of plaintiff, bearing upon the manner in which she received her injuries, is as follows:

"Direct Examination:

"A. Well, I opened the door to go in and I pushed it back about half-way or more, and just as I stepped in, the siren blew, and I stopped to count the whistles, because there was no one at home that afternoon, and I stepped inside one step, I think, and then when the siren blew, I turned around right quick to see what I could see and hear, and I stepped forward, I think, on to the plate, and the door pushed to; it come to very slow, and then all at once it give me a push and pushed me off and threw me out.

"Q. I show you a picture, Mrs. Gibson, and ask you if you recognize the scene shown in that photograph? A. Yes.

"Q. What is it? A. Well, it's the door of the courthouse.

"Q. The one that you were entering when your accident occurred? A. Yes.

"Q. Had you passed through that door prior to that time? A. Yes, several times.

"Q. Did you ever notice that self-closing apparatus on the door? A. Well, I never noticed it particularly, because I always pushed the door open and went directly in and went on.

"Q. Did you notice this smooth place on the step there? A. Yes, I noticed that, yes.

"Q. What is your best recollection about it? Do you know whether you got inside the threshold or not? A. Well, I think I did, I got just inside, just about one step.

"Q. Do you remember opening the door? A. Yes.

"Q. Now, where were you when you were struck? A. Well, I was standing right in the door.

"Cross-Examination

"Q. And do you understand that the door swings from inside—that that door does not swing out across the iron plate at all, does it? A. No.

"Q. It stops at the threshold, and the threshold is at the north side of the iron plate? A. Yes.

"Q. Now, Mrs. Gibson, will you tell us just how the accident occurred? A. Well, I got inside the door, pushed the door open and stepped inside, I suppose I stepped on that step, you know, and the siren blew just as I got inside the door, the door was about half-open, I turned around to count the whistles, you know we were burned out once, and ever since then I have been anxious about a fire, there was no one at home there that day, and I turned around and faced the street to count the number of whistles, and then all of a sudden the door gave me a push and just threw me out just like you would throw out a bucket of water.

"Q. You had gotten off of the concrete steps entirely then? A. Yes, I was up inside the courthouse.

"Q. *You had crossed the threshold?* A. *Yes.*

"Q. At the door there is a wooden strip along there that marked the bottom of the door, we will refer to that as the threshold? A. Yes, I got inside.

"Q. Both feet? A. Yes.

"Q. Had you given the door a shove? A. I gave the door a push and pushed it about half-way back.

"Q. And then just after you had pushed the door half-way back and when both of your feet were on the courthouse floor and inside the door you heard the siren ring? A. Yes.

"Q. And then you stopped and turned around, did you? A. Yes.

"Q. So that you were facing Perkins Street? A. Yes.

"Q. And where did the door—where did the door hit you, on the back or buttocks or where? A. I wouldn't say as to that; just shoved me out on the street, never struck the steps at all, threw me about six feet out on the walk.

"Q. *You weren't on that iron threshold at the time, were you?* A. *I think I was.*

"Q. *You mean at the time the door struck you?* A. *Yes, I think I was standing right on it.*

"Q. *With both feet?* A. *Yes, both feet, yes.* Of course I got inside, didn't get any further than just inside the door.

"Q. That threshold, for your information, I mean this iron plate is just inside the threshold? A. Yes. Of course I could not swear that I was standing right square on it.

"Q. *A little while ago you said both feet were inside the threshold when you turned around?* A. *Yes, I was inside with both feet, of course, I stepped right inside when I opened the door.*

"Q. *Both feet were inside then when the door struck you?* A. *Yes, sir.*

"Q. And at the time the door struck you it struck you on the back, did it? A. It must have; I don't know how else.

"Q. At least your back was toward the door when it did strike you? A. Yes.

"Q. What happened then? A. Well, it threw me out on the walk about six feet out.

"Q. When the door struck you, throwing you out, did you touch any of the steps at all? A. I don't think so.

"Q. The top step? A. No, I don't think so; throwed me clear of the steps right on the sidewalk about six feet away. I just picked myself up and crawled back on the curb, and sat down and a girl ran out.

"Q. Now, you say that the door struck you with such force that you were knocked from inside the door clear out onto the sidewalk? A. Yes, onto the walk, about six feet out.

"Q. And you don't think that after you were struck by the door that you touched *either the iron plate or any of the steps?* A. *No, I just cleared the whole thing.*"

[1] From the foregoing it appears that the only reasonable conclusion to be reached was that plaintiff was *inside the building* when she was struck. The door swung inwardly, making it physically impossible for it to have come in contact with her person if she were standing outside, and upon the metal plate. (See attached photograph.) Her positive testimony confirms this explanation. She says that after she was struck she did not touch the steel plate or any of the steps— "I just cleared the whole thing." The finding that she was struck while standing upon the steel plate is clearly not supported by any evidence in the record.

[2] There is no finding to the effect that the door was defective or dangerous. There is a finding that the self-closing apparatus, at said time and during all of said times herein mentioned, exerted a sudden and powerful thrust outward in closing said door", but it is a matter of common knowledge that all such contrivances, in order to function properly, exert a similar force. Furthermore, plaintiff testified that she had used the door a number of times preceding the accident. In any event, the finding of negligence is predicated upon a combination of two factors: the "sudden and powerful thrust" upon the door by the closing apparatus, and the fact that plaintiff was standing upon the smooth or worn place existing upon the metal plate. As we have indicated, there is no evidence to sustain a finding that plaintiff was standing upon the plate. As to the condition of the door, the statute quoted above requires plaintiff to plead and prove either a "dangerous or defective condition" existing upon the property. There is no allegation in the complaint to the effect that it would, on account of a defect, slam shut with such violence as to knock plaintiff off her feet. Neither is there any finding to that effect, or to the effect that the door functioned improperly, or in a manner different from other doors similarly controlled. Under the allegations of the complaint, a case of negligence could not be made out unless plaintiff was standing upon the worn spot when struck. Conversely, if she was standing upon the worn spot, she could not have been struck by the door which opened inwardly. As the evidence does not support a finding to the effect she was standing upon the metal plate when struck, there is no liability upon the part of the county.

[3] Conceding that the worn spot on the metal plate was a dangerous or defective condition within the provisions of the statute mentioned, the evidence fails to show that such condition had any connection with the infliction of the injury upon plaintiff, and thus the case fails to come within the rule that "the burden rests upon the plaintiff to show by a preponderance of evidence, not only that the defendant was guilty of negligence as alleged in the complaint, but that such negligence was the proximate or a concurring proximate cause of the injury". 19 Cal. Jur., p. 696.

[4] We have examined the entire record, and are satisfied that the proof of negligence here falls far short of the minimum required by law, and that the county should not be compelled to respond in damages for the injuries sustained by respondent.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

36 Cal.App.2d 96

MASSACHUSETTS BONDING & INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 11217.

District Court of Appeal, First District, Division 1, California.

Dec. 14, 1939.

Hearing Denied Feb. 8, 1940.

1. Workmen's compensation ⚷1939

The District Court of Appeal could not interfere with finding of Industrial Accident Commission that employee sustained injury occurring in course of and arising out of his employment, since it is not the province of such court to weigh the evidence.

2. Workmen's compensation ⚷1074

In determining whether to make compensation award against first insurance carrier which was carrier at time of claimant's injury without reference to or apportionment with second insurance carrier which was carrier at time of subsequent occurrence after which claimant was obliged to cease work, Industrial Commission had duty to determine whether second occurrence was an independent occurrence or was proximate and natural result of first injury.

3. Workmen's compensation ⚷1939

Determination of Industrial Commission that compensation claimant's first injury which occurred at time first insurance carrier was carrier for employer was proximate cause of claimant's subsequent condition and that alleged subsequent injury which occurred at a time when second insurance carrier was employer's carrier was not an independent occurrence, could not be disturbed where finding was supported by testimony of employee and a physician.

4. Workmen's compensation ⚷1939

Whether a subsequent accident is an independent intervening cause of compensation claimant's injury is question of fact for the Industrial Commission, to be decided in view of all the circumstances, and commission's conclusion must be sustained whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld.

◆

Petition by the Massachusetts Bonding & Insurance Company, insurer, for a writ to review and annul an award of the Industrial Accident Commission in favor of Orville O. Saffer, claimant.

Award affirmed.

W. N. Mullen and James C. McDermott, both of San Francisco, for petitioner.

Everett A. Corten and Eldon B. Spofford, both of San Francisco, for respondents.

R. P. Wisecarver, of San Francisco, amicus curiae.

WARD, Justice.

This is a petition by the Massachusetts Bonding & Insurance Company for a writ to review and annul an award of the Industrial Accident Commission of this state in favor of Orville O. Saffer.

The facts may be stated as follows: Orville O. Saffer, employed by A. R. Reid, as foreman in his cement business, worked the entire day of January 10, 1929, handling and moving barrels weighing four or five hundred pounds. He felt no inconvenience at the time, but that evening he noticed a pain in the back of his neck and upper spine between his shoulder blades. The next day the condition had not improved and included a very stiff right shoulder. He complained to his employer but continued at his usual work. In February a physician and surgeon diagnosed the ailment as arthritis. On or about the 21st of March he had a particularly heavy day which necessitated considerable climbing and the lifting of heavy spray cans and material, after which he suffered pain so that two days later he was obliged to cease work. The larger number of medical experts who examined or treated Saffer declared that the condition was arthritic or neuritic and that the injury was nonindustrial. One expert testified he was suffering from inflammation of the muscles, resembling rheumatism, caused by strain, the direct result of the January occurrence; that the second unusual exertion involved in the March incident further aggravated the preexisting condition, and that the injuries were industrial in nature. The commission adopted the latter view.

[1] It is not within the province of an appellate court to weigh the evidence, hence we may not interfere with the finding that the employee "sustained injury occurring in the course of and arising out of his employment when he strained his back" in January.

[2] Different companies acted as insurance carriers for the employer in this case at the time of the January incident and that of the March incident. The pertinent question is whether under the evidence herein the commission could properly find that the proximate cause of the injury was the January incident and make an award against the compensation carrier for the employer at the time of the first injury without reference to or apportionment with the insurance carrier at the time of the second occurrence. The answer is that it is incumbent upon the commission to determine as a fact the proximate cause; that is, whether a second injury is an independent occurrence, or the proximate and natural result of the first injury. Head Drilling Company v. Industrial Accident Commission, 177 Cal. 194, 170 P. 157; United States F. & G. Co. v. Industrial Accident Commission, 95 Cal.App. 186, 272 P. 589.

[3] In the herein case the commission found that the injury sustained in March was a recurrence of the January incident, and not an independent injury. This finding could be based only upon the testimony of the employee and one of the doctors. The doctor stated in substance that the occurrence in January was the cause of the injury, and that any injury in March further aggravated the preexisting condition. Saffer in his application for adjustment of the claim states that his disability was sustained in lifting the five hundred pound barrels. Under such circumstances the commission's determination that the first injury was the proximate cause of his condition may not be disturbed.

[4] The Massachusetts Bonding & Insurance Company, petitioner herein, claims that not until March did the employee suffer an impairment of his earning capacity and that such date is the date of the injury; that at such time petitioner was not acting as the insurance carrier for the employer. Compensable disability due to an accident may occur immediately or subsequent to the accident. The time of its occurrence is a question of fact. A subsequent injury may aggravate an original injury and still not be recurring, that is, one of the proximate causes of the condition. If the aggravating injury was simply a recurrence and not an independent injury, the date of the impairment of Saffer's earning capacity is immaterial except to fix the date of the liability, that is, the date of his incapacity for work; it does not interfere with the right and duty to establish one date as the date of causation of the injury and a second date as that from which compensation accrues. An interesting discussion on this subject is found in Marsh v. Industrial Accident Commission, 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563, but we feel that the conclusion in Head Drilling Company v. Industrial Accident Commission, supra, is controlling, where, at page 197 of 177 Cal., page 158 of 170 P., the court said: "Whether the subsequent incident or accident is such, or should be regarded as an independent intervening cause is a question of fact for the commission, to be decided in view of all the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld."

The award is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

SOUTHERN PAC. MILLING CO. v. MILLIGAN et al.*

Civ. 12374.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1939.

1. Exemptions ⚷4

Exemptions from attachment are creatures of statute, and courts are powerless to add to or to subtract from the list of exemptions. Civ.Code, §§ 1245–1254; Code Civ.Proc. § 540; Const. art. 17, § 1.

2. Homestead ⚷186

A homestead is exempt from execution except where homestead declaration has not been filed prior to issuance of execution and where, after receiving the report of appraisers, court orders sale in those instances in which so much of the land and the residence cannot be set off to the claimant as will amount in value to the homestead exemption. Civ.Code, §§ 1240, 1241, 1253, 1254; Const. art. 17, § 1.

---

*For subsequent opinion see 104 P.2d 654.

3. Homestead ⚷201, 203

Where property claimed to be exempt from attachment as a "homestead" can be partitioned in such manner as to have the house and an area of ground worth $5,000 set aside as "homestead," the balance is subject to levy and sale, and if partition cannot be made, the entire property must be sold, if a bid in excess of $5,000 is received, and the $5,000 must be paid to the claimant and the balance applied to the satisfaction of the execution. Civ.Code, §§ 1245–1254; Const. art. 17, § 1.

4. Homestead ⚷66, 70

A parcel detached from a homestead as nonexempt, or excess of the sale value of the homestead over $5,000, is the creditor's equity and is subject to attachment as in the case of any other nonexempt property. Civ. Code, §§ 1240, 1241, 1245–1254; Code Civ. Proc. § 540; Const. art. 17, § 1.

5. Homestead ⚷186

Realty upon which homestead declaration was filed prior to levy of attachment was subject to attachment, since the entire tract was not necessarily exempt, and the attachment could not possibly injure the owners. Civ.Code, §§ 1240, 1241, 1245–1256; Code Civ.Proc. § 540; Const. art. 17, § 1.

◆

Appeal from Superior Court, San Luis Obispo County; Atwell Westwick, Judge.

Action by the Southern Pacific Milling Company against J. T. Milligan and others on a book account for merchandise, wherein plaintiff caused a farm and home of defendants to be attached. From an order releasing the levy, the plaintiff appeals.

Reversed.

Schauer, Ryon & McMahon, of Santa Barbara, and W. T. Shipsey, of San Luis Obispo, for appellant.

Alex. Webster, of Paso Robles, for respondents.

MOORE, Presiding Justice.

Suing upon a book account for merchandise, plaintiff caused a "farm and home" of defendants to be attached. After the hearing of a motion to discharge the writ upon the ground that as a homestead it was exempt from attachment, the trial court released the levy. From the order made, plaintiff appeals.

[1] The sole question presented is whether realty upon which a homestead declaration has been filed can be validly attached. Since exemptions are creatures of statute (Stanton v. French, 91 Cal. 274, 37 P. 657, 25 Am.St.Rep. 174), and since the appellate decisions furnish no precedent, we must find answer in the constitutional and codal provisions.

[2] Courts are powerless to add to or to subtract from the list of exemptions. In re Estate of Brown, 123 Cal. 399, 55 P. 1055, 69 Am.St.Rep. 74. "The Legislature will protect, by law, from forced sale a certain portion of the homestead." Const., art. XVII, sec. 1. The homestead is exempt from execution or forced sale except (1) where the declaration has not been filed prior to issuance of the execution (Civ. Code, §§ 1240, 1241), and (2) where, after receiving the report of appraisers, the court orders a sale in those instances in which so much of the land and the residence cannot be set off to the claimant "as will amount in value to the homestead exemption". Civ.Code, §§ 1253, 1254. But, because only that property may be attached under section 540 of the Code of Civil Procedure which is not exempt from execution, it is contended by defendants that their homestead is not subject to attachment because their declaration was of record prior to its attachment.

[3, 4] There are two answers to these contentions: (1) Since the homestead is not exempt if the appraisal and partition proceedings provided for under sections 1245–1254 are followed, it may be said to consist of the debtor's legal homestead and the creditor's equity. If it can be partitioned in such manner as to have the house and an area of ground worth $5,000 set aside as a "homestead", the balance is subject to levy and sale. If such partition cannot be made, the entire property must be sold, if a bid in excess of $5,000 be received (Civ.Code, § 1255), the $5,000 paid to the claimant and "the balance applied to the satisfaction of the execution." Civ. Code, § 1256. The parcel detached from the homestead or the excess of the sale value over $5,000 may be termed the creditor's equity. Since it is subject to sale under execution, it is also subject to attachment as in the case of any other nonexempt property.

[5] (2) Moreover, no provision is made for appraisal proceedings and order in the case of attachment. The statute for that

remedy merely requires a sheriff "to attach and safely keep all the property of * * * defendant * * * not exempt from execution." Code Civ.Proc. § 540. This is not equivalent to a levy of an execution. It is harmless as to the debtor, for if the homestead can or cannot be sold for a sum in excess of $5,000, no possible injury can befall the claimant. On the one hand, he gets his $5,000 or a detached parcel of that value; on the other, he remains secure in his undivided ownership.

For the reasons above indicated the order discharging the attachment is reversed.

We concur: WOOD, J.; McCOMB, J.

---

36 Cal.App.2d 6

PEOPLE v. COOPER.

Cr. 3178.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1939.

Hearing Denied Jan. 4, 1940.

1. Criminal law 🔑338(7)

In robbery prosecution, trial court erred in permitting district attorney to show that defendant and another who had signed statement involving himself and defendant in commission of robberies had first met in county jail, since place of their meeting was not material.

2. Criminal law 🔑396(2)

In robbery prosecution, admission of entire signed statement of another involving himself and defendant in commission of robberies was not justified under statute on ground that defendant testified concerning his answers made to police officer when police officer showed him signed statement, where defendant's declaration was not of such nature that "to make it understood" it was necessary to introduce entire statement. Code Civ.Proc. § 1854.

3. Criminal law 🔑396(2)

In robbery prosecution, admission of entire signed statement of another involving himself and defendant in commission of robberies could not be justified on ground that when signed statement was presented to defendant by police officer defendant made certain incriminatory declarations in regard to it.

4. Criminal law 🔑706

In robbery prosecution, question asked by district attorney of one who signed written statement involving himself and defendant in commission of robberies, as to whether he and defendant went into certain store other than ones in which robberies, which defendant was charged with allegedly occurred, was improper.

5. Criminal law 🔑720½

District attorney's argument to jury that if facts, evidence, and law warrant him as individual to ask jury to bring in verdict of guilty based on those things alone, he was going to do it, and that in any case, if there was reasonable doubt, he was not going to ask jury to convict, was subject to criticism as an attempt to argue to jury as individual rather than in his official capacity, but did not constitute prejudicial error, where it was apparent that district attorney based his opinion concerning defendant's guilt upon evidence.

6. Criminal law 🔑720½

In criminal prosecution, neither district attorney nor attorney for defense should add weight of his personal opinion to evidence in support of his cause.

7. Criminal law 🔑1037(1), 1129(1)

Where defendant's counsel did not assign misconduct of district attorney in his argument to jury and ask trial court to instruct jury to disregard argument, defendant could not complain of such argument on appeal.

8. Criminal law 🔑730(13)

District attorney's argument that, if prosecution wanted to "pour" it on defendant, there could be seven felony counts filed against him, in addition to two charges of robbery for which he was on trial, although improper, did not constitute prejudicial error, where trial court promptly instructed jury to disregard statement.

9. Criminal law 🔑1186(4)

Under Constitution, District Court of Appeal is prohibited from reversing convictions unless, after examination of entire clause, including evidence, it is of opinion that the errors committed during course of trial have resulted in a miscarriage of justice. Const. art. 6, § 4½.

10. Criminal law ⚿1186(4)

Defendant's conviction on two counts of robbery would not be reversed for errors committed during course of trial, where evidence presented such overwhelming proof of defendant's guilt that it was not reasonably probable that verdict other than guilty would have been returned by jury if errors had not been committed. Const. art. 6, § 4½.

McCOMB, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Telford Cooper was convicted of robbery, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged in each of two counts with the crime of robbery and in each count it was charged that he had previously been convicted of the crime of rape and had served therefor a term of imprisonment in the state prison. Defendant admitted the prior conviction but entered pleas of not guilty to the charges of robbery. A jury returned verdicts of guilty on both counts and defendant appeals from the judgments thereafter pronounced.

Defendant now contends that the district attorney was guilty of misconduct and that the trial court erred in its rulings on the admission of evidence. The record discloses certain errors, but in our judgment they are not of such character as to justify a reversal in view of the evidence presented by the prosecution. We therefore set forth the most important evidence presented to show the guilt of defendant.

The complaining witness referred to in count I of the information, C. J. Lewis, testified that he was on January 20, 1938, the manager of a market operated by the Safeway stores at 6355 South Broadway in the city of Los Angeles. At about 6 o'clock in the evening the witness was closing the doors of the market when defendant entered. After he finished closing the doors and was getting a breadbox Mr. Lewis saw defendant standing in front of the cash register. He left the box and asked defendant if there was something he wanted, to which defendant replied "two camels". Mr. Lewis then went to the check stand to get the cigarettes and while he was reaching for them defendant moved around toward the door. When the witness looked up defendant produced a revolver and ordered the witness to get money for him. In response to this demand the witness took a paper bag from under the check stand, put money in it and handed it to defendant. While this was being done defendant unlatched the door to the market, holding it open so that he could escape. During all of this time defendant was facing the witness. At the trial Mr. Lewis was shown a revolver which had been received in evidence. He testified that it was similar in appearance to the revolver which defendant held at the time of the robbery. A cap and overcoat were exhibited at the trial and Mr. Lewis testified that they were similar in appearance to those worn by defendant at the time of the robbery. These garments had been found by officers in a vacant lot to which they had been directed.

John Sullivan, the complaining witness referred to in count II, testified that on January 22, 1938, he was employed as a salesman for the Safeway stores in Los Angeles, the store where he was employed being located at 5975 South Hoover street. At about 6:15 p. m. the witness was standing in the middle of the store in front of the butcher's counter, at which time the manager of the store was going to the rear with some empty bottles. The witness volunteered to take the bottles back but the manager indicated that he would do it himself. When the witness turned around he saw defendant standing by the check stand so he walked to the check stand and asked what he could get for him. To this defendant responded by shoving a bag to the witness and demanding that he "fill it up". The transcript shows the following questions and answers:

"A. He said 'Fill it up.' I says, 'Fill what up?' He shoved the bag over and I saw a gun. I hollered then, 'Oh, Johnnie!' That was the manager. On account of my being the clerk I wanted him to see I was held up. So he turned around and this man pointed the gun and said, 'Turn the other way.' So in the meantime I took the bag and filled it up with the money that was in the cash register.

"Q. How much did you put in the bag? A. $99.00, they tell me.

"Q. Will you tell me where with reference to the man that held you up, how close did you get to him, how far away was he? A. Oh, just a couple of feet."

Mr. Sullivan also identified the revolver in evidence as being similar to the one with which defendant was armed at the time of the robbery. He testified that the cap and overcoat which were exhibited at the trial were similar to the cap and overcoat worn by defendant at the time of the robbery.

John Winn, the manager of the market at 5975 South Hoover street, testified that on the evening of January 22, 1938, as he was taking some empty bottles to the back room he heard the clerk, Sullivan, call and on turning around he saw defendant standing with a gun at the counter holding up Sullivan. Defendant ordered the witness to turn around but he did not do so for a minute or a minute and a half. The witness identified the cap and overcoat exhibited in court as similar to the ones worn by defendant at the time of the robbery.

William Caskey, a meat cutter in the employ of the market at 5975 South Hoover street, testified that on the evening of the robbery he had stepped to the back room of the store to attend to some business and when he started to return to the front of the store he heard the witness Sullivan call "John". At that time the witness pushed the swinging door separating the back room from the front part of the store partially open and saw defendant in the act of robbing Sullivan. The witness also heard a motor running and tried to go out through the back door to get its number. He found the back door barred and when he returned Sullivan had been released. The witness thereupon went to the side of the store and saw a faded green Chevrolet automobile about two blocks away. It was shown that the witness Haigh, to whom reference will hereafter be made, was the owner of such a car. This witness also testified that the cap and overcoat exhibited in court were similar to the clothing worn by defendant at the time of the robbery.

Harold Crawford, a clerk in a sporting goods store located on West Fourth street, testified that he had sold the revolver admitted in evidence to defendant on January 19, 1938, and that at that time defendant told the witness that the gun was being purchased for someone else. The witness informed defendant that the other man would have to get the revolver and sign for it in his own name. When so informed defendant said he would sign for it, but he signed the name of William Haigh. The weapon was held at the store for twenty-four hours in accordance with required procedure and thereafter a person identified in court as William Haigh called for it. Before leaving the store defendant procured five shells for the revolver in question and took them with him.

Police officer Winter testified that William Haigh had signed a statement involving himself and defendant in the commission of the robberies which was presented to defendant to read and that defendant had stated, "I don't know anything about it except buying the gun. * * * I will admit I bought the gun." The statement itself was admitted in evidence on rebuttal. The defendant testified that when Officer Hudson showed him the statement signed by Haigh and asked him, "What do you think about this?" he, the defendant, had replied: "If the man signed this, which I don't think he did, he must be crazy." The officer then asked, "Don't you know anything about it?" and the defendant replied, "Absolutely not, other than that I did get the gun for him. I went down and picked the gun out and paid for it. Outside of that I know nothing about it."

[1-3] Defendant now contends that the trial court erred in its rulings on the admission of evidence. There is force in his argument that it was improper for the court to permit the district attorney to show that Haigh had first met defendant in the county jail. The place of their meeting was not material. Complaint is also made of the ruling of the court in admitting in evidence the written statement signed by Haigh involving defendant and Haigh in the commission of the two crimes for which defendant was on trial. The district attorney had presented Haigh as a witness but Haigh had refused to testify concerning the commission of the crimes on the ground that his answers would tend to incriminate him. The court at first refused to admit Haigh's written statement in evidence. Thereafter defendant became a witness and gave testimony concerning his answers made to Officer Hudson. The court thereupon permitted the entire statement to be read in evidence, apparently on the theory that "when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary

to make it understood, may also be given in evidence". Code Civ.Proc., sec. 1854. The declaration of defendant was not of such a nature that "to make it understood" it was necessary to introduce the entire statement of Haigh in evidence. Neither can the introduction of the entire statement be justified on the ground that when it was presented to defendant he made certain incriminatory declarations in regard to it.

[4] Defendant charges misconduct on the part of the district attorney in asking the witness Haigh if on January 22, 1938, he and defendant went "into another store where there was a man by the name of Herman Runge, also a Safeway store, located on South Western Avenue". The question was interrupted by an objection from counsel for the defense. The court overruled the objection on the ground that the question was preliminary, but the witness refused to answer. We cannot see how the question could have been preliminary. It should not have been propounded.

[5, 6] Defendant argues that the district attorney was guilty of misconduct in making certain remarks during his address to the jury. The prosecutor said: "The way I have always conceived my position or job, or whatever you want to call it, is that I am here to present the facts and the evidence. Now, if those facts and the evidence and the law warrant me as an individual to ask a jury to bring in a verdict of guilty based on those things alone, I am going to do it; if I am satisfied in my own mind from the evidence, I am going to ask the jury to find a man guilty. In any case if based on the evidence and the law there is a reasonable doubt, I am not going to ask any jury to convict. I have done that consistently. I am going to do it." These remarks are subject to criticism. The prosecutor appeared as a public official and should not have attempted to argue to the jury as an individual rather than in his official capacity. Neither the district attorney nor the attorney for the defense should add the weight of his personal opinion to the evidence in support of his cause. It is fairly apparent, however, that the district attorney based his opinion concerning defendant's guilt upon the evidence.

[7] It is to be noted that in neither of the instances just referred to did counsel for defendant assign misconduct on the part of the district attorney and ask the court to instruct the jury to disregard it. Defendant is not now in position to take advantage of these errors on the part of the prosecutor. People v. McAfee, 82 Cal. App. 389, 255 P. 839.

[8] Defendant complains that the district attorney was guilty of misconduct in making the following remarks during his address to the jury: "Now, I say that Mr. Haigh was found guilty of one count, the count where he actually perpetrated by going in himself with the gun, he was found guilty of that. We did not see fit to prosecute him on two additional counts. If we wanted to cause the taxpayers to spend the money and go through another trial we could do it, yes. This defendant is on trial for two counts where he went in and actually committed the robbery. Now, if we wanted to pour it on to Mr. Haigh he could be brought back here and tried as an aider and abetter on these two counts for which this defendant is here on trial, and Mr. Hamilton seems to think from his remarks that we see only one side, that we are trying to pour it on, and in view of those remarks I think it is only fair to point it out to you that if we wanted to pour it on so far as this defendant is concerned, in addition to the charges for which he is now on trial, there could be seven felony counts filed against him in addition to the two charges of robbery." In this instance counsel for defendant assigned misconduct and the court promptly and properly instructed the jury to disregard the improper statement of the prosecutor.

[9, 10] As has been hereinabove indicated, errors were committed during the course of the trial, but under section 4½ of article VI of the Constitution of California we are prohibited from reversing the judgments unless after an examination of the entire cause, including the evidence, we shall be of the opinion that the errors have resulted in a miscarriage of justice. The prosecution presented proof of the guilt of defendant of two separate robberies at different stores. Defendant was recognized by four different witnesses at these two robberies, witnesses who had ample opportunity to observe him. Defendant admitted that he purchased the weapon used in the robberies. These facts, together with other evidence above mentioned which need not be here repeated, present such overwhelming proof of defendant's guilt that it is apparent that it is not reasonably probable that verdicts

other than guilty would have been returned by the jury if the errors had not been committed. We are satisfied that there has been no miscarriage of justice.

The judgments are affirmed.

I concur: MOORE, P. J.

McCOMB, Justice (dissenting).

I dissent. In my opinion the errors which the majority opinion concedes were made by the trial court are prejudicial and do not fall within the purview of article VI, section 4½, of the Constitution of California. Therefore, I conclude that the judgments should be reversed.

---

36 Cal.App.2d 77

In re WOODSON'S ESTATE.

Civ. 11225.

District Court of Appeal, First District, Division 1, California.

Dec. 13, 1939.

1. Bastards 🔑 5

Mother had right to deny accuracy of statement in birth certificate with respect to paternity of her child. Pol.Code, § 3083.

2. Evidence 🔑584(1)

"Prima facie evidence" is not conclusive evidence, but simply denotes that the evidence may suffice as proof of a fact until contradicted and overcome by other evidence. Code Civ.Proc. § 1833.

[Ed. Note.—For other definitions of "Prima Facie Evidence," see Words & Phrases.]

3. Evidence 🔑383(3)

Entries in official record books, made in the performance of official duty, are "prima facie evidence" of the facts stated therein, but such entries do not in and of themselves always express or guarantee the truthfulness of the contents of the document. Code Civ. Proc. §§ 1833, 1920, 1926.

4. Descent and distribution 🔑71(7)

In suit to determine whether alleged daughter of deceased was entitled to inherit as such, the credibility of mother who denied the accuracy of recital in birth certificate showing another to be the father and the credibility of other witnesses, and weight to be given certain documentary evidence, were questions for the trier of the facts. Pol. Code, § 3083; Code Civ.Proc. §§ 1833, 1920, 1926.

5. Descent and distribution 🔑71(6)

In suit to determine right of alleged daughter of deceased to inherit as such, evidence was sufficient to overcome prima facie effect of birth certificate which showed alleged daughter to be the daughter of another, and was sufficient to entitle alleged daughter to inherit an undivided one-half interest in estate of deceased. Pol.Code, § 3083; Code Civ.Proc. §§ 1833, 1920, 1926.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the estate of Fred Woodson, deceased, wherein Shirley Woodson had been appointed administratrix. From a decree declaring Betty Jean Woodson to be an heir at law and entitled to an undivided one-half of the estate of Fred Woodson, deceased, J. Maurice, as administrator of the estate of Eliza Wooldridge, appeals.

Affirmed.

Jay Maurice and Vaughns & Larche, all of Oakland (Frank M. Larche, of Oakland, of counsel), for appellant.

Edward D. Mabson and John W. Bussey, both of San Francisco, for respondents.

WARD, Justice.

This is an appeal by the administrator of the estate of Eliza Wooldridge, deceased, the mother of Fred Woodson, deceased, from an order, judgment and decree, declaring that Eliza Wooldridge is not an heir at law of Fred Woodson and that Betty Jean Woodson is an heir at law and entitled to an undivided one-half of the estate of Fred Woodson, deceased.

The evidence shows that the mother of Betty Jean had been married to a man named Terry and from this marriage there had been born one child. Shirley Terry arrived in San Francisco in January of 1932 and lived for about one year in a Pine street apartment owned by Woodson.

In February of 1933 she moved to an apartment on Sutter street, and on June 22d following, Betty Jean was born at the San Francisco Hospital, the mother registering under the name of Williams, and the birth certificate of Betty Jean stating that the residence of the father and mother was at the Sutter street address; that George Melvin Williams was the father of the child and that the maiden name of the mother was Shirley Terry. Some six or seven months after the birth of the child the mother moved back to the home of Woodson on Pine street, and in December of 1935 Woodson and Shirley Terry were married. Fred Woodson died intestate on the 29th day of November, 1936, predeceasing his mother Eliza Wooldridge. Thereafter Shirley Woodson his wife, was appointed the administratrix of his estate.

The court found that Betty Jean Woodson was conceived during the month of September, 1932, at a time when Shirley Woodson, then known as Shirley Terry, was residing in and upon the premises owned and occupied by decedent Fred Woodson. The court also found that prior and subsequent to the marriage, Fred Woodson publicly acknowledged Betty Jean as his child and that he received her into his family and treated her in every way as a legitimate child.

[1] It is the contention of appellant that Betty Jean is the issue of Williams, who died in May, 1936, and Shirley Terry, now Shirley Woodson; that the evidence did not reasonably and substantially support certain findings to the contrary; that a marriage between Williams and Shirley Terry was proved by the admissions and conduct of these parties, and that as a result of such conduct an estoppel arose which operated against either of the last-named parties denying that they were husband and wife or that they were the parents of Betty Jean. In support of appellant's contention that Shirley Terry and George Melvin Williams were husband and wife, and that Betty Jean was the issue of such marriage, a certified copy of the birth certificate was introduced and marked as an exhibit in the case. The exhibit in fact does not state that Shirley and Williams were husband and wife, but it does state the name of Williams as the father of the child. Shirley Woodson had the right to deny the accuracy of the statements contained in the birth certificate, and if such contrary evidence was believed it was sufficient to overcome the prima facie effect of the documentary evidence. In Arais v. Kalensnikoff, 10 Cal.2d 428, 434, 74 P.2d 1043, 1047, 115 A.L.R. 163, the court said: "In the birth certificate, the mother caused John Morales to be named as the father of the child; but this does not raise an estoppel against her and require a reversal of the judgment, as the defendant contends. There is no evidence that she led the defendant to believe that this statement was true. On the contrary, the record supports the implied finding of the trial judge that she gave a fictitious name for the father at the request of the defendant and for the purpose of protecting him." In the instant case the credibility of the mother was exclusively with the trial court. Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am.St.Rep. 131.

[2, 3] Section 3083, Political Code, as in force at the time, provided that a copy of the record of a marriage or birth when certified by the state registrar to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated. Prima facie evidence is not conclusive evidence; it simply denotes that the evidence may suffice as proof of a fact until or unless contradicted and overcome by other evidence. Code Civ.Proc., sec. 1833. Entries in official record books, made in the performance of official duty, are prima facie evidence of the facts stated therein (secs. 1920, 1926, Code Civ.Proc.), but such entries do not in and of themselves always express or guarantee the truthfulness of the contents of the document.

[4, 5] There is no evidence of a marriage between Williams and the mother of Betty Jean by license and solemnization or otherwise unless an inference may be drawn from the conduct of the parties that such a relation existed.

The witness Shirley Woodson admitted that she had given the name of Williams to the hospital authorities as the father of the child. She testified in substance that she did not use the name of Woodson on occasions because he "was threatened to be sued and I did that to protect Mr. Woodson." He "asked me not to use his name at that time".

Other evidence pro and con upon the issues in this case was admitted, which was exhaustively considered in the briefs, but all of such evidence related to questions of fact regarding the credibility of witnesses or the weight to be given certain documentary evidence, matters to be determined exclusively by the trier of the facts. It is not necessary to discuss further facts and arguments submitted by respondents to uphold their contention as to the correctness of the decree that Betty Jean Woodson is the owner of an undivided one-half interest in the estate of Fred Woodson.

The order, judgment and decree appealed from is affirmed.

We concur: PETERS, P. J.; GOODELL, Justice pro tem.

---

36 Cal.App.2d 92

In re LYONS' ESTATE.

LYONS v. LYONS.

Civ. 11227.

District Court of Appeal, First District, Division 2, California.

Dec. 13, 1939.

Rehearing Denied Jan. 12, 1940.

Hearing Denied Feb. 8, 1940.

1. Wills 🔑489(2)

Where it was alleged that cousin referred to in seventh paragraph of will was testator's second cousin and it appeared that, on partial distribution of estate, distribution was made under paragraph 7 of will to testator's second cousin without objection from first cousin having same name, evidence was inadmissible to show that, in codicil bequeathing trust estate to cousin "mentioned in paragraph seven" of will, words "paragraph seven of" were mistakes and that first cousin was intended legatee, since there was no ambiguity. Supreme Court Rule 8.

2. Wills 🔑435

There can be no reformation of a will on ground of mistake, accident, or surprise.

3. Wills 🔑488

Parol evidence is not admissible to explain a pure mistake in a will unless language of will itself furnishes basis of correction and mistake is so apparent upon face of will that correction may be made by proper construction of terms of will.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Daniel Lyons, deceased, wherein Cornelius Lyons filed a petition for declaratory judgment opposed by Cornelius Lyons. From adverse orders, plaintiff appeals.

Affirmed.

Rogers & Clark and John A. O'Kane, all of San Francisco, for appellant.

Frank J. Fontes, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The controversy in this proceeding arises between two legatees under the will of Daniel Lyons, each of whom is named Cornelius Lyons. The appellant is a first cousin and the respondent a second cousin of the deceased. Appellant's statement of the issues involved given under rule VIII of the Supreme Court we quote in full:

"Extrinsic evidence is admissible where the provisions of decedent's codicil contain a latent ambiguity in that extrinsic facts reveal an uncertainty as to the identity of a residuary legatee named Cornelius Lyons, there being two persons of that name neither of whom exactly answers the declarations and descriptions of the codicil.

"Extrinsic evidence likewise is admissible to ascertain the identity of such residuary legatee where the name and description contained in the codicil apply substantially to both parties."

The portions of the will which are the root of the controversy read:

"Seventh: I give, devise and bequeath to my cousin, Daniel Lyons, Cornelius Lyons and Catherine Schultz, children of John Lyons and Mary Lyons of Eighteenth and Church streets, San Francisco, the sum of One Thousand ($1000.00) Dollars each; * * *

"Fourteenth: I hereby nominate and appoint Cornelius Lyons of 630-11th Avenue, San Francisco, and Dennis Kelly, of 641-8th Avenue, San Francisco, executors of this my last will and testament to serve without bonds * * *."

In a codicil executed four years later the testator revoked a special bequest made in paragraph fifth of his will and created a trust in favor of his brother with the stipulation that: "Upon the termination of this trust the entire principal of the trust estate then held by the trustee shall vest free from any trust in and go and be distributed by the trustee to my cousin, Cornelius Lyons mentioned in Paragraph Seventh of my said last will and testament and if he be dead then to his children and heirs at law, share and share alike, such heirs at law taking by right of representation;"

In due course of administration, partial distribution was made to the special legatees named in the will including the "cousin" of the testator named in paragraph seventh, the respondent herein. No objection to such distribution was made by appellant, and the determination made in that decree that respondent was the "cousin Cornelius Lyons mentioned in paragraph seventh of my said last will" has become final, and no longer open to attack. After numerous continuances, respondent's petition for distribution under the codicil, and appellant's attack thereon in the form of a petition for declaratory relief came on for hearing. At that time appellant made the offer to prove that he and not the respondent was the intended beneficiary under the codicil. The matter was fully argued, and the learned trial judge gave appellant every opportunity to show what he intended to prove if witnesses were called, the extent of which was that the language of the codicil was a mistake because the respondent, who concededly was the one mentioned in paragraph seven of the will, was but a second cousin, whereas the appellant, who was the one mentioned in paragraph fourteen of the will, was a first cousin. It was also suggested that the latter had several children while the respondent had but one and hence that the reference in the codicil "to his children and heirs at law, share and share alike" must have applied to the appellant and his children.

[1] In ruling that the proffered testimony was not admissible, the trial court did not commit any prejudicial error in view of the pleadings upon which the opposition was based. The appellant alleged in his petition that the respondent was the Cornelius Lyons mentioned in paragraph seventh of the will. As one of the executors he appeared without objection and thus consented to the partial decree of distribution under which respondent was paid the special bequest of $1000.00 under paragraph seven designating him as "my cousin". Appellant concedes that he makes no complaint regarding that special bequest, but argues and offers to prove that "the language of paragraph seven is a mistake, an inadvertence".

Reverting to the appellant's statement of the question involved, it will be conceded that extrinsic evidence is admissible where there is an ambiguity as to the identity of a legatee named in a will and where the descriptions used may apply equally to two parties. But the facts of this case do not present such inquiries. There is no ambiguity of description when the respondent alone comes within the language of paragraph seven of the will which is made a part of the codicil by reference. There is nothing in the language of paragraph seven (except the word cousin) which meets the description of appellant, who is specifically referred to in other portions of the will, named as one of the executors thereof, and treated as a party distinct from the respondent.

In the final analysis appellant's case is simply this: He contends that the testator must have intended to leave the bequest to him rather than to respondent, that his scrivener erred, and that the testator erred when the codicil was written and signed. The case is found in paragraph VI of his petition alleging: "that the words 'Paragraph Seventh of' contained in said subparagraph 3 of Paragraph Second of said codicil are a mistake and erroneous and said codicil should be corrected by striking therefrom said words as not expressing the true meaning and intent of said Daniel Lyons, deceased * * *." This is a far different case from that presented in the briefs and in the offer of proof—a case dependent upon the premise that there was uncertainty in the codicil because paragraph seven of the original will was ambiguous. But in view of the positive allegation in the petition that respondent was the one named in paragraph seven, it must be manifest that there could be no uncertainty as to identification of parties when the codicil merely picked up the accepted identification found in the original will.

[2, 3] The rule of law applicable to the entire controversy, eliminating the incon-

sequential questions of matter of procedure, is found in 28 Ruling Case Law, page 278, reading: "The rule in the construction and interpretation of wills is fundamental that there can be no reformation of the instrument on the ground of mistake, accident, or surprise. This is because its author is dead, and his intent can only be known from the language he has used. A mistake in a will therefore cannot be shown by parol evidence. Nor is such evidence admissible to explain a pure mistake in a will, unless the language of the will itself furnishes the basis of the correction. *The mistakes must be apparent upon the face of the will,* and so apparent that the correction may be made by a proper construction of the terms of the will. Otherwise, there can be no relief." (Emphasis ours.)

The orders appealed from are affirmed, respondent to have his costs.

We concur: STURTEVANT, J.; SPENCE, J.

36 Cal.App.2d 86

EVJU v. BARBERS' UNION, LOCAL 134.

Civ. 10909.

District Court of Appeal, First District,
Division 2, California.
Dec. 13, 1939.

1. Trade unions 🔑5

In action by administratrix to recover salary alleged to be due estate for services performed by decedent as secretary of defendant union, whether evidence supported defense of estoppel, in that decedent knew of arrangement of his predecessor in office of voluntarily taking a cut in salary because of decrease in union receipts and voluntarily took same reduction, was for jury.

2. Appeal and error 🔑933(1), 979(2)

When motion for new trial is granted upon ground that evidence was insufficient to support verdict, it will be presumed that trial court properly exercised its judgment, and the order will not be reversed unless it appears that there was manifest abuse of discretion.

3. Appeal and error 🔑979(2)

In action by administratrix to recover salary alleged to be due estate for services performed by deceased as secretary of defendant union, in which jury found for plaintiff, appellate court would not reverse trial court's order granting defendant new trial upon ground that evidence was insufficient to support verdict, where plaintiff did not show that trial court abused its discretion, but relied wholly upon conflict in evidence.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Suit by Vivian Evju as an individual, and Vivian Evju as the administratrix of the estate of Carl Melvin Evju, also known as C. M. Evju, also known as Carl M. Evju, against the Barbers' Union, Local 134, an unincorporated association, to recover salary alleged to be due the estate of deceased. From order granting new trial, following verdict in favor of plaintiff, the plaintiff appeals.

Order affirmed.

Edward E. Craig and Herbert Johnson, both of Berkeley, for appellant.

Lionel B. Benas and Guy McCoy, both of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover salary alleged to be due the estate of Carl Evju, deceased. A jury's verdict favorable to plaintiff was set aside by order granting a new trial. The appeal is taken from this order.

[1] The decedent was elected secretary-treasurer of defendant union in January, 1934, when the union by-laws fixed the salary of his office at fifty dollars a week. The decedent's predecessor in office had voluntarily taken a cut in salary to $160 a month because of a decrease in union receipts. The decedent knew of this arrangement and voluntarily took the same reduction in all the pay checks which he made out during the full term of his employment, which ended in February, 1937. The question presented to the jury was a mixed one of law and fact—whether the evidence supported the defense of acquiescence and estoppel. Upon this issue the evidence was conflicting but greatly preponderating on the side of the defense. The only question now before us is whether the trial court erred in granting defendant a new trial upon

the ground that the evidence was insufficient to support the verdict.

[2, 3] In holding that the appellant has failed to show reversible error we rely upon the accepted rule that when a motion for a new trial is granted under these circumstances, it will be presumed that the trial court properly exercised its judgment, and the order will not be reversed unless it appears that there was a manifest abuse of discretion. 20 Cal.Jur., pp. 30-31, 112-113; Gordon v. Roberts, 162 Cal. 506, 508, 123 P. 288; Owings v. Gatchell, 32 Cal. App.2d 482, 488, 90 P.2d 368. The appellant has not shown an abuse of discretion, but relies wholly upon a conflict in the evidence which he contends might have supported the verdict if the new trial had not been granted. The accepted rule is that this is not a sufficient showing upon an appeal of this character.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

PEOPLE v. LONG. *

Cr. 1992.

District Court of Appeal, First District, Division 1, California.

Dec. 14, 1939.

1. Criminal law 🔑1137(3)

An appellant cannot complain of an erroneous instruction offered by himself.

2. Criminal law 🔑1133

Points raised for the first time on petition for rehearing will not be considered.

3. Criminal law 🔑1137(3)

The rule concerning invited error has no application where the trial court modifies proffered instructions.

4. Criminal law 🔑1137(3)

Where trial court modifies proffered instruction, instruction becomes instruction of the court and, if erroneous, is subject to the same criticism as if given without request.

5. Criminal law 🔑1137(3)

Where first half of instruction on reasonable doubt was offered by accused, and second half of instruction was given by trial court of its own motion, and modification of instruction accentuated error contained in first half of instruction, error was prejudicial as against contention that accused could not complain of erroneous instruction offered by himself.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

On petition for rehearing.

Rehearing denied.

For prior opinion, see 96 P.2d 354.

Edward A. Cunha and John J. Taaffe, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for respondent.

PETERS, Presiding Judge.

The petition for a rehearing is denied.

[1] On this petition the sole point urged is that one of the two instructions held to be erroneous and prejudicial was in fact an instruction offered in part by the appellant. The instruction in question is the one on reasonable doubt. The respondent relies on the well-settled rule that an appellant cannot complain of an erroneous instruction offered by himself. 8 Cal.Jur., p. 564, sec. 564. That is a salutary rule.

[2] Aside from the fact that the attorney-general raises this point for the first time on rehearing, and that, under well-settled rules of appellate practice, points so raised will not be considered, there are at least two reasons why a rehearing should not be granted in the present case.

[3-5] In the first place, while it is true that the first half of the instruction on reasonable doubt was offered by appellant, the second half of the instruction was given by the court of its own motion. The rule concerning invited error has no application where the trial court modifies the proffered instruction. In such case the instruction becomes the instruction of the court, and, if erroneous, is subject to the same criticism as if given without request. 8 Cal.Jur., p. 566, sec. 564, and cases cited. This last-stated rule has peculiar application to the present case. In modifying the proffered instruction by adding the second half there-

---

*For subsequent opinion see 103 P.2d 969.

to, the court accentuated the error contained in the first half. The second half directly contradicts the first half. By giving the second half of the instruction, of its own motion, the trial court obviously confused the jury and contradicted itself. In a case as close on the evidence as this one, the error was prejudicial.

In the second place, the giving of the erroneous instruction on reasonable doubt was not the only ground of reversal, as contended by the attorney-general. The opinion holds that the giving of the erroneous instruction on expert testimony was also prejudicial. The giving of this instruction would alone call for a reversal.

For the foregoing reasons it is obvious that the petition for a rehearing should be denied. It is so ordered.

We concur: WARD, J.; GOODELL, Justice pro tem.

---

36 Cal.App.2d 66

TICE v. PACIFIC ELECTRIC RY. CO. et al.
HIGGINS et al. v. SAME.

Civ. 12243.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1939.

Rehearing Denied Jan. 5, 1940.

See 97 P.2d 844.

1. Railroads 🔑348(1, 2, 6)

In actions against electric railway company and motorman for injuries and death resulting from crossing collision between automobile and interurban car, evidence *held* to authorize verdict for defendants on ground of lack of negligence by railway, of contributory negligence by guests, or of driver's negligence as sole proximate cause.

2. Railroads 🔑309

The rules of caution applicable to steam railways in crossing collision cases are applicable to interurban car lines.

3. Railroads 🔑335(1)

An automobile guest who fails to do what an ordinarily careful person would have done under the same or similar circumstances cannot recover.

4. Railroads 🔑350(13)

Whether an automobile guest has exercised such care as an ordinarily careful person would have exercised under similar circumstances is a fact question for the jury.

5. Railroads 🔑327(12), 350(13)

An automobile passenger is normally bound to protest against the driver's actual negligence or recklessness; the extent of his duty depends upon the particular circumstances and is a question for the jury.

6. Railroads 🔑327(12)

If an automobile passenger observes anything that might tend to endanger his safety, it is his duty to notify driver of this danger, as required by ordinary prudence for his own safety.

7. Trial 🔑295(1)

Error in an instruction must appear from a consideration of the instruction as a whole and not from mere phrases or clauses considered separately and apart from the whole.

8. Railroads 🔑351(12)

Where each instruction substantially set forth a correct statement of legal principles applicable to the facts, and question of whether guest passengers were guilty of negligence so as to preclude recovery by passengers from electric railway company was left to jury, the question of passenger's negligence was properly submitted.

9. Railroads 🔑327(8)

In approaching a railroad crossing, automobile driver has continuous duty to maintain a lookout in the directions from which danger is to be anticipated, and hence instructions requiring maintenance of lookout up to the last moment before the collision were not erroneous.

10. Trial 🔑313

The sending of any communication to the jury in the absence of counsel and without their express stipulation is irregular and should be avoided. Code Civ.Proc. § 614.

11. Appeal and error 🔑1069(3)

Irregularity in sending to jury, during counsel's absence, an affirmative answer to their inquiry on whether they could return verdict in favor of one plaintiff and not in favor of the other, was not prejudicial where jury found against both plaintiffs, counsel had stipulated that court might reread instructions or give new instructions during counsel's absence, and there was no showing of prejudice. Code Civ.Proc. § 614.

McCOMB, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County.

Action by William Edward Tice, by William A. Tice, his guardian ad litem, against the Pacific Electric Railway Company and another, consolidated for purpose of trial with action by David R. Higgins and others against the Pacific Electric Railway Company and others, for injuries and death resulting from collision between automobile and interurban car. From judgments for defendants, plaintiffs appeal.

Affirmed.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for appellants.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Two judgments are appealed from. Both were in favor of defendants, the two cases having been consolidated for the purposes of trial before a jury.

The actions were based upon the alleged negligence of the defendants—the company and its motorman—in the operation of an electric train upon a private right of way on Venice boulevard between Los Angeles and Santa Monica. Within the right of way is a double track which crosses the streets and highways between said cities. On the evening of August 4, 1936, about 8:20 o'clock, a Ford automobile, while being driven by Leonard Wright southerly along Sepulveda boulevard, was struck by defendant's train going easterly along Venice boulevard. His two youthful companions, Edward Tice and Arthur Higgins, received severe injuries, as a result of which Arthur lost his life. At said intersection the tracks are straight in both directions from said boulevard for more than one thousand feet. The private right of way is separated from the two travel lanes of Venice boulevard by curbs, except at the highway crossings. At said Sepulveda crossing are two wigwag signals with bells and red lights, one on each side of the right of way. The boulevard stop sign is located at the northwest corner of the intersection about 110 feet north of the westbound track. At the time in question, the signals were wagging, the bells ringing and the lights were aglow.

Plaintiffs based their claims for a reversal of the judgments upon the following propositions: (1) that there was ample and substantial evidence to establish the negligence of defendants and that said negligence caused the accident; (2) that Arthur and Edward were not negligent, and in any event, the question of their contributory negligence is, at most, one of fact for the jury; (3) that the instructions were vicious in that they charged plaintiff with a degree of care beyond the requirements of law and relieved defendants of the duty of exercising care; (4) that the trial court committed prejudicial error in sending to the jury the answer to a question propounded through the bailiff and the clerk. Upon a review of the record, we are forced to conclude that the plaintiffs have not sustained their contentions.

[1] I. From the conflicting evidence the jury may justifiably and readily have found for defendants. There was testimony that the train was traveling at a speed of about sixty miles per hour, and at thirty-five miles per hour; that while going at sixty miles per hour, it approached Sepulveda boulevard without whistling or other signal; that it operated on a private right of way and blew its whistle at four hundred feet west of Sepulveda boulevard; that Leonard stopped the Ford at said intersection and looked; that he did not stop; that the train had a head light, was noisy, was lighted and the night was clear; that Leonard looked westerly for 1000 feet on said Venice boulevard and saw no train approaching; that while the wigwag was working for the westbound train standing one block east of Sepulveda, there was nothing to indicate that there was other cause for its movement; that the train's speed would require from 400 to 600 feet to stop; that Leonard coming at an average speed of six miles per hour over said 110 feet could have stopped in a moment; that in approaching the right of way, he traveled forty-five miles per hour; that the train was 400 feet west of Sepulveda while the Ford was 400 feet north of Venice boulevard. Out of these conflicts, it was solely for the jury to derive the truth.

[2] II. The rules of caution applicable to steam railways are applicable to in-

terurban car lines in such circumstances as those presented in the foregoing summary. Riney v. P. E. R. R. Co., 45 Cal.App. 145, 187 P. 50; Herbert v. Southern Pac., 121 Cal. 227, 53 P. 651. In the latter case, it was held that the railroad track of a steam railway must itself be regarded as a sign of danger and "one intending to cross must avail himself of every opportunity to look and to listen for approaching trains. * * If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions." The Supreme Court, in the case of Simoneau v. P. E. R. R., 159 Cal. 494, at page 504, 115 P. 320, held that the crossing of an interurban electric railway is to be governed by the same rules as those applied to steam railways and that the rule of precaution laid out in Herbert v. So. Pac. supra, is applicable here. In Korchak v. Pacific Electric R. R. Co., 9 Cal.App.2d 89, 48 P.2d 752, involving an accident in Culver City and on the same boulevard where the Ford was struck, it was held that, since the accident happened on the company's private right of way and not upon the paved streets of the city, the rules relating to steam railroad crossings govern.

[3-6] It is the rule that when a guest fails to do that which an ordinarily careful person under the same or similar circumstances would have done, he cannot recover. Whether or not the guest so situated has exercised such care is a question of fact for the jury. Meyers v. So. Pac. R. R., 63 Cal.App. 164, at page 168, 218 P. 284. The justice of each case must be derived from its own facts. Parker v. So. Pac., 204 Cal. 609, 269 P. 622. The passenger in an automobile is normally bound to protest against actual negligence or recklessness of the driver; the extent of his duty depends upon the particular circumstances of each case and is a question for the jury. Wagner v. Atch., Topeka & Santa Fe R. R., 210 Cal. 526, 292 P. 645. If a passenger observes anything which might tend to endanger his safety, it is his duty to notify the driver of this danger in order that he may avoid it. Parmenter v. McDougall, 172 Cal. 306, 156 P. 460. Ordinary prudence for his own safety would require this. Cate v. Fresno Traction, 213 Cal. 190, 2 P.2d 364.

In view of the principles declared by the foregoing cases, the facts presented in the instant case were such as were calculated to persuade a jury that the defendants were not negligent or that the two guests were guilty of contributory negligence or that the driver's negligence was the sole proximate cause of the impact. The question of contributory negligence of the plaintiffs was an issue, and by their implied finding, the jury must have decided that Arthur and Edward were guilty of contributory negligence, if they did not find that Leonard's negligence was the sole proximate cause or that defendants were not negligent.

[7-9] III. The instructions read to the jury are attacked upon various grounds. They have been scrutinized with a view of determining whether prejudicial error resulted from any of them. We find no instruction which does not state the law correctly although we cannot say they are all in the best of form. We refer particularly to the formula instructions. The latter are not calculated best to serve most successfully the administration of justice. Their final disappearance will improve the conduct of court trials. A number of the instructions are attacked on the ground that isolated portions thereof do not correctly state the law. But an error in an instruction must appear from a consideration of the instruction as a whole and not from mere phrases or clauses considered separate and apart from the whole. Von Stetten v. Yellow Checker Cab Co., 100 Cal.App. 775, 281 P. 95. Others are attacked upon the ground that they incorrectly state the law relative to the degree of care required of a guest passenger. But each instruction sets forth substantially a correct statement of legal principles applicable to the facts of the case. Furthermore, by certain instructions submitted by the plaintiffs, the question as to whether or not said passengers were guilty of negligence was left to the jury's determination. For the reasons and upon the authorities above cited, the question of the negligence of the guest passengers was properly submitted to the jury. Stewart v. San Joaquin Light & Power Corporation, 44 Cal.App. 202, 186 P. 160. Criticism is made of certain other instructions to the effect that they require the driver of the automobile to exercise a greater degree of care than is lawfully required; still other instructions are criticized on the ground that they imposed upon the driver the duty of maintaining a lookout up to the last moment before the collision. Neither criticism is well taken. In the case of the former, the matters covered are fairly and correctly stated; with reference to the latter, it is the law that in ap-

proaching a railroad crossing, a continuous duty is imposed upon the driver to maintain a lookout in the directions from which danger is to be anticipated. There being no prejudicial error, in the instructions given, reversal cannot be had upon that ground.

[10, 11] IV. A serious attack is made upon the judgments because the court sent an answer to an inquiry of the jury through the clerk and the bailiff. Prior to the retirement of the jury, the parties stipulated that in the absence of counsel, the court might read any instruction to the jury upon their request, or give any other in writing. While the jury was out, a message was sent by the jury through the bailiff inquiring of the judge whether or not a verdict could be returned in favor of one of the plaintiffs and not in favor of the other. The judge replied by writing out on a piece of paper and sending to the jury: "Yes, they may decide in favor of one plaintiff and not in favor of the other." The jury having returned a verdict against both plaintiffs, they now complain that the conduct of the judge was prejudicial, citing Nelson v. So. Pac. Co., 8 Cal.2d 648, 67 P.2d 682. It is true that any communication sent to the jury in the absence of counsel or without their express stipulation is irregular and the practice is one to be avoided. It is the law that "if [the jury] desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court". Code Civ.Proc. § 614. But the irregularity complained of was not prejudicial. (1) The jury found against both plaintiffs. (2) Counsel had stipulated that "In the absence of counsel, the court may upon the request of the jury bring the jury into the court and re-read to the jury any instruction previously given, or may give any new instruction upon any matter that may be requested providing that any such new instruction is in writing and taken down in shorthand". That disposed of the necessity of counsel's presence. (3) The judge's communication was no attempt to state the legal principles for the jury's guidance. (4) There is no showing that plaintiffs were prejudiced by the court's communication. In the case of Nelson v. So. Pacific Co., supra, while holding that the court committed an irregularity in sending a message by the bailiff without the presence of counsel, the court never concluded that the message sent was prejudicial error. In the case of Soukoian v. Cadillac Taxi Co., 68 Cal.App. 604, 229 P. 1015, while the court held that, after submission, no communication whatever ought to take place between the judge and the jury after the case had been committed to them, yet a communication between the jury and the officer having them in charge, or the clerk of the court, will not be cause for a new trial when it is made to appear that no harm resulted. In the case of Meinecke v. Fidelity Investment Co., Tex.Civ.App., 62 S.W.2d 623, 624, a message was written by the foreman of the jury and was conveyed by the bailiff to the judge who wrote thereon that the jury would answer the issue in accordance with the charge already given them" and returned the same writing to the jury by the bailiff. While the court held that this manner of communication between the court and the jury is error, it said: "Such a communication is not of itself vicious. It can be done by agreement. The error can be waived. If counsel abandon the watchful care of his case, leave the courthouse, and some routine communication with the jury is necessary and counsel has absented himself so that he cannot be consulted as to the necessity of disturbing the jury's deliberations to bring them to the jury box, sometimes from a different floor or building, the blind obedience to such a ritual might well be questioned." In Tilley v. Montelius Piano Co., 15 Colo. App. 204, 61 P. 483, 485, the jury forwarded to the judge by the bailiff an inquiry as to whether they might return a verdict in favor of the defendant but allow the plaintiff $25 for repairing his piano, to which the court returned by the same bailiff, orally, the answer "no". The supreme court of Colorado, in considering a code section identical with our own, said: "This section, like all other Code provisions, must be given a reasonable construction, and in applying this we think that, if there was error at all, it was wholly without prejudice." The communication written by the judge contained nothing that was calculated to mislead the jury in any respect. For this reason the irregularity was not prejudicial.

The judgments are affirmed.

I concur: WOOD, J.

McCOMB, Justice (dissenting).

I dissent:

From judgments in favor of defendants after trial before a jury in actions to recover damages (a) for the wrongful death of the son of David R. and Annie M. Higgins and (b) personal injuries to plaintiff William Edward Tice resulting from a collision between an automobile in which the deceased and injured were riding and an electric interurban street car owned and operated by the defendant corporation, plaintiffs appeal.

The essential facts are these:

August 4, 1936, Leonard Wright was driving an automobile in which William Edward Tice and John Arthur Higgins, the son of plaintiffs David R. and Annie M. Higgins, were riding. While crossing the defendant corporation's right of way at Venice and Sepulveda boulevards in the city of Los Angeles, the automobile was struck by an interurban car owned and operated by defendant corporation. Defendant Nordquist was the motorman of the car. As a result of the accident John Arthur Higgins died and William Edward Tice received serious personal injuries.

After the case was tried and the jury instructed, counsel for the respective parties entered into a stipulation reading in part as follows:

"First, that in the absence of counsel the Court may, upon the request of the jury, bring the jury into Court and reread to the jury any instruction previously given, or may give any new instruction upon any matter that may be requested providing any such new instruction is in writing or taken down in shorthand."

Subsequently, and while the jury were deliberating, the jurors requested additional instructions. The bailiff informed the clerk of the request, who contacted the trial judge by telephone. The trial judge gave an instruction to the clerk, which the latter wrote on a piece of paper and handed to the bailiff, who in turn delivered it to the jury.

This is the sole question necessary for us to determine:

Did the trial judge commit prejudicial error in giving an instruction to the jury out of court and out of the presence of the court?

This question must be answered in the affirmative. The law is established in California that it is prejudicial error to give additional instructions to a jury other than in open court, in the absence of a waiver of this right by the parties. Nelson v. Southern Pac. Co., 8 Cal.2d 648, 655, 67 P.2d 682. In the case cited our Supreme Court, in holding it to be reversible error to give instructions to the jury out of the presence of the court, thus states the rule at page 655 of 8 Cal.2d, 67 P.2d at page 685: "The remaining error charged was that the court communicated with the jury after their retirement by sending them a message by the bailiff and without the presence of counsel. This is an improper irregularity. Section 614 of the Code of Civil Procedure requires that, if the jury desire further instruction, it shall be conducted into court and the information desired given in the presence of or after notice to counsel. Any other method of communication is held to go to the substance of the right of trial by jury and because of its nature is deemed to be prejudicial except in very exceptional circumstances. Redman & Yontz v. Gulnac, 5 Cal. 148; Soukoian v. Cadillac Taxi Co., 68 Cal. App. 604, 229 P. 1015; People v. Bruneman, 4 Cal.App.2d 75, 40 P.2d 891."

In the instant case it is true that counsel stipulated that in the absence of counsel the court might "bring the jury into court and * * * give any new instruction upon any matter that may be requested providing any such new instruction is in writing or taken down in shorthand." However, the procedure followed by the court herein did not conform to the stipulation of counsel, and there is nothing in their stipulation waiving their right to have the jury instructed in court according to the provisions of section 614 of the Code of Civil Procedure.

Nor is the requirement that the procedure set forth in the code section be followed a so-called technical rule. It is a matter of common knowledge that counsel frequently stipulate that in their absence the trial judge may return the jury into open court and there give to them new and additional instructions, the purpose being to save the time of the court. It is also a matter of common knowledge in the legal profession that ordinarily, when such a stipulation is entered into, counsel either remain in the courtroom or leave a clerk or associate with instructions to communicate with them immediately, should the jury desire additional instructions, in order that they may be present and protect the rights of their client by either assisting the court in framing the instructions to be given, by proposing additional instructions, or objecting to instructions proposed by the opposing party or the court.

For the foregoing reasons in my opinion the judgments should be reversed and new trials ordered.

END OF CASES IN THIS VOLUME

NATIONAL UNIVERSITY LIBRARY
3 1786 10046 8922

NATIONAL UNIVERSITY
LIBRARY
SAN DIEGO

NON CIRCULATING

NATIONAL UNIVERSITY